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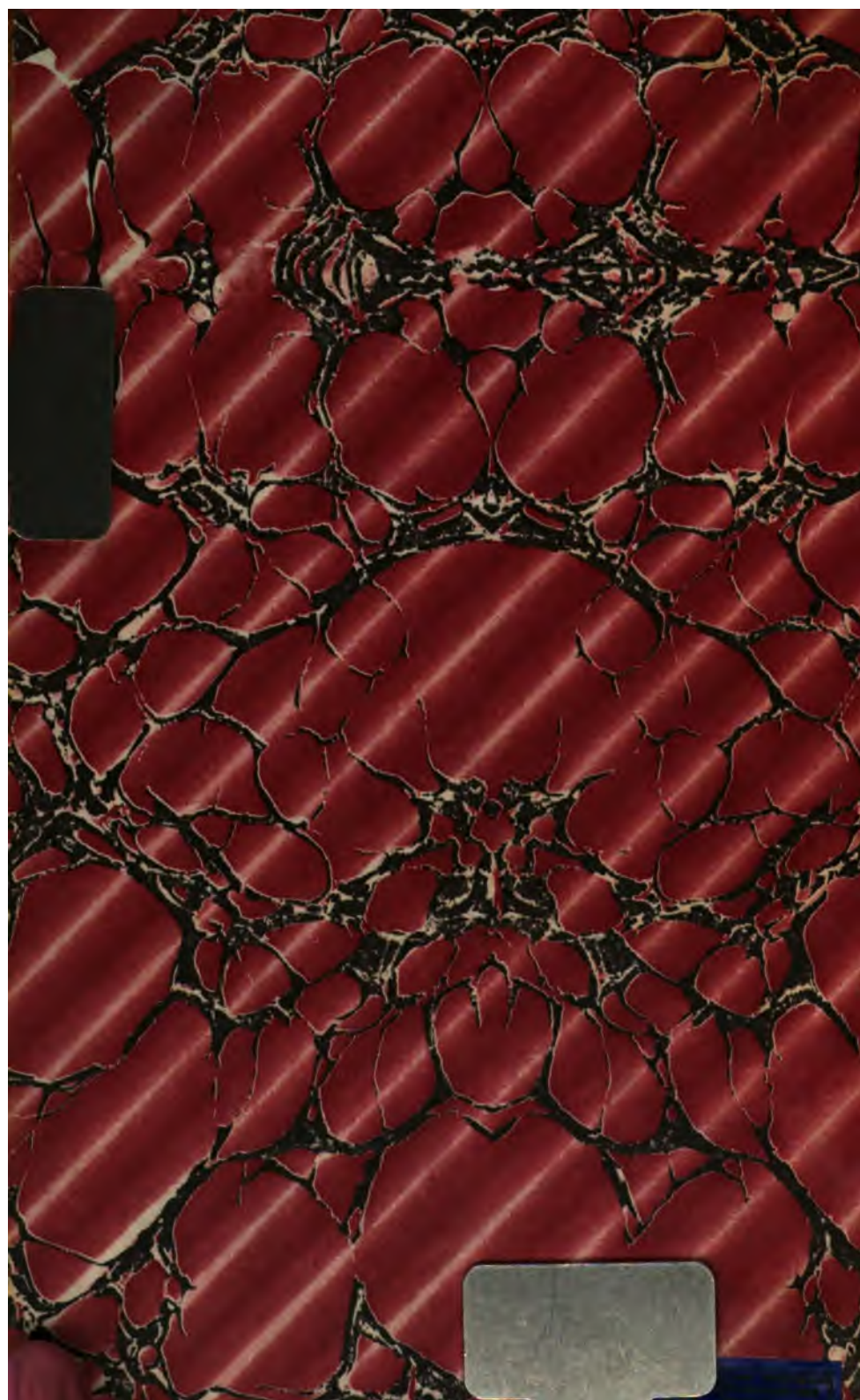
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ON THE  
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AND  
**L I B E L,**  
AND INCIDENTALLY OF  
**MALICIOUS PROSECUTIONS.**

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SECOND EDITION,  
WITH VERY CONSIDERABLE ADDITIONS.

---

By **THOMAS STARKIE, Esq.**  
OF LINCOLN'S INN, BARRISTER AT LAW.

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**VOL. I.**

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THIS TREATISE was originally dedicated, by permission, to the late LORD ELLENBOROUGH, Lord Chief Justice of his Majesty's Court of King's Bench, and the Author avails himself of this opportunity to pay his tribute of respect to the memory of that learned and noble Lord, who was, by the natural vigour of his mind, his classical and scientific attainments, and profound knowledge of the laws of his country, eminently qualified to adorn the high judicial office, the duties of which he discharged with inflexible integrity and consummate ability for the space of sixteen years.





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## PRELIMINARY DISCOURSE.

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SHOULD the faculty of communication by speech or writing (a) to be restrained by the municipal law?

If so, then within what limits?

The former question may readily be answered in the affirmative; to answer the latter is to solve a problem of difficulty, but of most essential importance to the interests of society; it is to discover and establish such legal limits to intellectual intercourse, as shall secure to the community the greatest quantity of good.

Where it is possible, consistently with natural justice, that is, with the principles of general expediency, wholly to permit, or wholly to prohibit, the work of legislation is easy; it is arduous and difficult in those cases only where either unlimited license on the one hand, or total restraint on the other would be inexpedient, and, consequently, where it becomes necessary

(a) In order to avoid repetition in the following pages, unless the context render a narrower meaning necessary, the term *writing* is to be understood to include all kinds of communications, by printing and painting, or any other signs or symbols, as well as writing.

to establish intermediate legal boundaries, by means of apt and definite limits.

Legislation, on the present subject, is peculiarly liable to difficulties of this nature; it is usually impracticable, or at least impolitic, either wholly to sanction or wholly to forbid any particular class of communications on any matters whatsoever, and, consequently, the question arises, how shall the restraining law be framed, so as, without wholly excluding either of two or more conflicting mischiefs, to reduce the aggregate of evil to its minimum. To place a bridle on men's tongues, so that they be restrained from calumny, without laying irksome fetters on the ordinary communications of society, and to curb the licentiousness, without, at the same time, cramping the salutary freedom of the press, is one of the most arduous, but, at the same time, valuable achievements of legislative wisdom.

Little need be observed as to the importance of laws by which every man's conduct is to be regulated, not only whenever he writes, but even whenever he speaks, or as to the necessity for legislative caution, where the mischief and inconvenience which would result from even a slight defect, are liable to indefinite multiplication by the constant application of the law. It were lost time to dwell on minute errors, when considerations of a far higher and more urgent character demand attention.

The faculty of speech, one of the first and noblest gifts of the Creator, designed, no doubt, for the expression of gratitude to the Donor, of truth and goodwill towards men may be abused, for the purposes of blasphemy, fraud, and malice.

Those admirable means which have been devised by human ingenuity (*b*) for giving permanency and ubiquity to thought, for providing durable receptacles to knowledge, in which, like a valuable treasure, it may be preserved, accumulated, and transmitted to distant regions and to all ages; by the aid of which, the wise and the learned, though locally distant, may unite in the service of science, and availing themselves of the labours of past generations, accomplish magnificent triumphs in the cause of reason and of truth, to which individual talent and exertion might have ever proved unequal, those honoured and splendid means to which mankind must trust, for the safe preservation of all that is sacred and valuable in their religion, their history, their laws, for the security of their liberty and their possessions, to which they are indebted for every intellectual and refined enjoyment, in short, for all the blessings of civilized life; these, no doubt, may be fatally abused in furtherance of insidious practices against

(*b*) Some learned men have laboured to prove that letters are not of human invention, but divine revelation. Surely, it is more consistent with the bounty of Providence to suppose that faculties were originally given adequate to the discovery, than that a special interposition should be necessary for the purpose. Universal experience manifests the intention that all discoveries and improvements in science and in art should be worked out slowly and gradually, by means of the ordinary faculties originally bestowed upon our race.

It is not difficult, in the absence of any satisfactory tradition on this subject, to form probable conjectures as to the process of improvement, which has led from the depicting of rude resemblances, to such remote and admirable results.

the peace and welfare, or even the very existence of civil society. They may be perverted into the means of destroying men's religious faith, of extinguishing their sense of moral obligation, of ministering to every evil passion, of fostering every base and vicious propensity, and of actually accomplishing every crime.

Such being the unworthy purposes to which the arts of writing and of printing have been so frequently misapplied, it is manifestly of the most essential importance that such practices should be restrained by force of the municipal law. The reasons for restraint are rendered still more cogent, whenever two circumstances concur: the general diffusion of knowledge, by an extended system of education, and great facility of communication, by the agency of the public press. The former of these causes tends greatly to increase the number, as well of those who are capable of offending in this respect, as of those who are placed within the sphere of their influence and danger of contamination; whilst the latter multiplies, to a tremendous extent, the facility of working evil by unprincipled and immoral publications.

So long as a man's power of effecting mischief is limited to his own immediate and personal efforts, however violent and noxious they may be, against the persons or property of others, the evil which he works must be of a local and limited nature; but when it is extended by exerting a pernicious and wicked influence over the understandings of mankind, through the medium of the press, its power is bounded neither by time nor place; any one vicious

and unprincipled mind may, as it were, be brought into contact with, and is enabled to exercise its influence over those of millions; thus even a single individual, as if invested with a kind of mischievous ubiquity, is enabled to disseminate blasphemy, sedition, and immorality to the remotest borders of the realm, and the very mass of society may thus be exposed to the danger of contamination and corruption.

The main object of the following Treatise is to trace the municipal provisions of the law of England on this important subject; but it may not be without use, certainly not without interest, to devote some brief previous attention to the general principles on which such restraints may be constructed, and to inquire whether there be any, as it were, natural boundaries to be discerned by which such communications ought, with a view to the convenience and happiness of society, to be limited. One rule may prevail at Athens and another at Rome; partial variations are attributable to the genius and temper of the people (*c*), to the political constitution under which they live, to their peculiar manners and habits, yet must the great distinctions pointed out by reason and natural justice be common to all countries and all ages (*d*).

(*c*) Solon being asked if the laws he had given to the Athenians, were the best, replied, "I have given them the best they were able to bear." Montesq. l. 19. c. 21. Divorce was permitted by the Mosaic law among the Jews by reason of the hardness of their hearts.

(*d*) *Est quidem vera lex recta ratio, naturæ congruens, diffusa in omnes constans sempiterna.*—*Nec erit, alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed omnes gentes & omni tempore, una lex &*



Such then is the object of preliminary inquiry; an occupation, it must be confessed, more grateful to a lawyer than the tedious detail of a mass of complicated and oftentimes conflicting decisions, in much the same proportion as a casual visit to foreign countries, to contemplate at leisure their principles and forms of justice, would be more agreeable than the ordinary routine of an English circuit.

The first question, that is whether such communications ought to be regulated and restrained by any municipal laws, may then, it seems, without the least hesitation, be answered in the affirmative.

The experience of all nations from times of the remotest antiquity, shews the necessity for such laws; their rudiments are to be found in all stages of civilization, however imperfect, remote and proximate to barbarism (*e*). Though little is known of the

*sempiterna, & immutabilis continebit; unusque erit communis quasi magister & inspector omnium deus.*—Cic. De Rep. lib. 3. Apud. Lact. lib. 6. c. 8.

(*e*) So far as it is allowable to speculate on the growth of legislation according to the increasing exigencies of mankind, it is probable that even among the most savage tribes, to impute the want of skill or bravery would be a reproach exciting resentment and violence; the increase of such attacks and reprisals, attended as it would be by the double inconvenience of dissension amongst those who were united for some common object, and weakening that force which was destined for other purposes, whether of aggression or defence, would first suggest the policy of restraining such insults, and substituting legal redress for personal retaliation of affronts.

Such laws, however, would be but of slow growth and little regarded among any people whose principal business was that of arms, and whose policy it was to cherish a high and daring spirit, whilst a war-

laws of ancient Egypt,—the venerable territory at once of science and of superstition, yet is it matter of moral

rior, whose courage or honour was reflected on, would but reluctantly delegate the duty of retribution to any hands but his own, conscious that his best proof that the imputation was undeserved, would be afforded by his mode of avenging such an affront.

In a more peaceful and settled state of society, when men had begun to pay deference to civil authority, although the protection of their persons and property from violence might be the earliest objects of legislative provision, yet would it very soon become necessary to make provisions against judicial perjury; and as such an offence, odious as it must always be, would, whilst the administration of justice was rude and imperfect, be highly dangerous, so is it probable that the penalties would be proportionally severe. By the ancient Roman law of the Twelve Tables on this subject, it appears that a corrupt and malicious witness expiated his offence, by being thrown headlong from the Tarpeian rock. In other respects, it is presumable, that the laws against defamation would, in all early stages of civilization, be few and simple. Their main object would be the preservation of the public peace, by the infliction of penalties in respect of oral defamation; libels would be out of the question when few could read, and fewer still could write. Hence it is that many of the earliest laws which history has transmitted to us, are of a penal rather than remedial nature; that they prescribe specific penalties or fines, rather than damages proportioned to the real circumstances, and, as is usual with early legislators, that their enactments are not general, but frequently limited and confined to particular imputations, which were considered as likely to produce violence and outrage.

By the Athenian laws, specified penalties, which varied from a fine of two drachmas to 500, were imposed, in respect of different degrees of defamation, some of which were specifically and expressly prohibited. Thus the fine or *δυν κακῶς*, for asserting that a soldier had thrown away his shield, amounted to 500 drachmas. See below. By the Law of the Twelve Tables, a specific fine was imposed on many offences, probably including that of defamation, when it fell within the description of the *injuria leviores*, though the punishment of fustigation

certainty that they were not destitute of such restraints.

at least was imposed on more atrocious calumniators. (See the observations on this subject below, p. xxxv.) And it is observable, that though, in later times, the Romans substituted an assessment of damages, *estimatio injuriæ*, apportioned to the extent of the injury, for an arbitrary fine, yet that no distinction was ever made by the Roman law, in the description and essence of the offence, between criminal and civil liability; whenever the offender was liable in damages, to the individual calumniated, he was also subject to penal censures. To the latest period of the empire, civil, as well as criminal liability, depended principally, if not entirely, on the ancient and primitive notion, that *personal contumely and insult* was of the essence of the offence, and upon this principle it is that the peculiarities of the Roman law, in respect of libel, chiefly depend.

This, it will be seen, is a circumstance which constitutes a very essential and characteristic distinction between the law of England and that of Rome, and of those countries which have adopted the civil law: for the law of England regards criminal and civil liability, in respect of calumnious communications, as standing upon entirely distinct foundations; and, in the next place, has, from very distant times, considered the temporal injury *to a man's estate*, and not the *contumely or insult* of the agent, as the ground of compelling reparation in damages.

According to an ancient law of the Burgundians, "*Si quis alterum concagatum clamaverit 120 denariis mulctetur. Si quis vulpeculam alterum clamaverit vel leporem eodem modo mulctetur.*" These, as is observed by a learned writer, (Barrington on the Penal Statutes,) appear plainly to be the laws of a warlike nation, in which the calling another by a name which implied cunning or flight, rather than courage or resistance, was thought a heinous infamy.

To a much later and more mature stage of civilization must those laws be referred, which consider defamation not merely as an insult to the feelings or dignity, which must be repressed for the sake of the public peace, but which regard reputation as a civil right, from its being intimately and inseparably connected with the acquisition and secure enjoyment of every social right, dignity, or emolument, and so essential a safeguard to every other temporal possession and enjoyment,

The well known fact that this singular people erected a tribunal (*f*) for trying the conduct even of their kings after death, and of decreeing or denying the honours of sepulture, according to the verdict, is in itself sufficient to demonstrate not only that they fully understood and appreciated the value of reputation and character, but also that they duly estimated and encouraged the love of reputation as a great moving principle of human conduct; and that they possessed sagacity sufficient to turn that knowledge practically to the public account by using this moral power in the most forcible and advantageous manner. There is perhaps no other memorial extant of this extraordinary nation which so strongly characterizes their political genius as does this remarkable institution (*g*), which, however, has served no other purpose among those who have copied largely from Egypt in other respects, than to supply the foundation of a well known branch of pagan mythology, as immortal as the epic poem in which it is so beautifully depicted. The effect of this custom among the Egyptians must have been greatly heightened by its connection with their superstition, in respect of the rites of sepulture, and the religious necessity of pre-

that to leave it unprotected would be to leave every man's property, liberty, and even life, insecure, and the work of legislation but half completed.

(*f*) Diod. Sic. B. 1.

(*g*) I find that M. Rollin (*Histoire des Egyptiens*, 73.) has characterised this custom as one of the most remarkable facts in ancient history, and he points out a very singular analogy in sacred history. The Israelites would not suffer those of their kings, who had lived wickedly, to be buried in the tombs of their ancestors.

serving the bodies of their dead in order to their subsequent reanimation.

It is impossible to suppose that, whilst even after death, conduct and reputation were the subject of anxious inquiry, direct and immediate provision was not also made by the laws of Egypt for securing and preserving the characters of the living.

It is not, however, essential to the present purpose to examine, in detail (*h*), the provisions connected with the subject in the laws of Judæa (*i*), Greece,

(*h*) For a very able and detailed historical account of the law of libel, see Mr. Holt's excellent work on the subject, Second edition, Book 1. ch. 1.

(*i*) The early denunciations of the Mosaic law against defamation are few and simple; no specific punishment, except in an instance which will presently be alluded to, was appointed against calumniators. There is, however, scarcely any offence which is more frequently alluded to in the Psalms of David, or more strongly described in the energetic and figurative language of the east, than that of slander; whether it be for the purpose of characterising the conduct of depraved and malicious men, of denouncing divine vengeance against them, or depicting the wretched and forlorn state of their unhappy victims; it may be further remarked that mention is seldom made of this species of injury, without some expression which shows that slander was meant, in its strict sense, as implying a false and deceitful representation.

Psalm 5. Thou shalt destroy them that seek leasing; the Lord will abhor both the bloodthirsty and deceitful man.

10. His mouth is full of cursing, deceit, and fraud; under his tongue, ungodliness and vanity.

14. There is none that doeth good, their throat is an open sepulchre, the poison of asps is under their lips, their mouth is full of cursing and bitterness, their feet are swift to shed blood.

31. Let the lying lips be put to silence which cruelly, disdainfully, and despitefully speak against the righteous.

or Rome, nations which probably derived their earliest knowledge of jurisprudence from Egypt; some of their

34. What man is he that lusteth to live and would fain see good days; keep thy tongue from evil and thy lips that they speak no guile.

35. False witnesses did rise up against me; they laid to my charge things that I knew not; the very objects came against me un-awares, making mouths at me and ceased not. They imagine deceitful words against those that are quiet in the land; they gaped on me with their mouths, and said, fie on thee! fie on thee! we saw it with our eyes.

38. My lovers and my neighbours did stand looking upon my trouble and my kinsmen stood afar off: they also that sought after my life laid snares for me, and they that went about to do me evil talked of wickedness and imagined mischief all the day long.

52. Thy tongue imagineth wickedness and with lies thou cuttest like a sharp razor. Thou hast loved to speak all words which may do hurt; O thou false tongue, therefore shall God destroy thee for ever.

58. The ungodly are froward even from their mother's womb; as soon as they are born they go astray and speak lies, they are venomous as the poison of a serpent.

59. Deliver me from mine enemies, O God! behold they speak with their mouths, and swords are in their lips..

69. They that sit in the gate speak against me, and the drunkards make songs upon me. See also Psalms 101, 102, 120, 140, &c. &c.

The publication of false reports, affecting the character of others, is prohibited by the Mosaic law, (Exod. xxiii. 1.) although no punishment is annexed to a violation of the law; whether that was left to the discretion of the judge, or no punishment whatever was inflicted, seems to be doubtful. See Michaelis's Comm. on the Law of Moses, art. 221. s. 2. The same learned writer observes, "this last supposition (i. e. of impunity,) prevailed with respect to the greater number of extrajudicial offences during the infancy of nations, which approaches nearly to a state of barbarism and lawlessness, wherein mere verbal attacks on reputation are not so highly estimated, nor yet even violent outrages so strictly interdicted as afterwards. But, on the contrary, a person thus injured is permitted to avenge himself on his traducer, provided he did

laws will afterwards require more particular attention; for the present, suffice it to observe that they all contain enactments imposing prohibitions and restraint, in order to guard against the abuse of language, by converting the privilege of communication into the means of effecting private injury or public (*k*) mischief.

The evils which necessarily arise from a licentious abuse of the faculties of speaking and writing, would be of too obvious a nature to bear inquiry or comment, were the mere necessity for restraint the sole object of investigation; but a far more difficult consideration remains behind, and, in order to judge of the mode and extent

not beat him to death, or render him a cripple. If a wicked action, which a man related concerning his neighbour was true, he received no punishment whatever; for the *exceptio veritatis* then operated in full force." Michaelis's Comm. on the Laws of Moses, art. 291. s. 2. Smith's translation.

There was one instance, and but one, where the law of Moses imposed a specific punishment upon the publication of calumnious falsehood, and that was where a man falsely accused his wife of not having proved a virgin on the wedding night. Deut. xxii. 13, 19. The penalty, in respect of such a charge, which, where well founded, was expiated by the death of the criminal, was threefold:—1st, Corporal by stripes; 2ndly, by the payment of a pecuniary fine, viz. 100 shekels to the woman's father, which was the highest fine imposed by the Mosaic law, and was no doubt given to the father in respect of the reproach which had been cast, not merely on the woman herself, but her parents, brothers, and sisters, and the whole family; 3rdly, by his forfeiture of the right of divorce.

(*k*) The necessity for such regulations naturally occurs to the illiterate as well as the educated. The members of Benefit or Friendly Societies, in this country, who usually legislate for themselves, seldom complete their simple, artless code without introducing penal prohibitions, and oftentimes singular ones, against unmannerly and abusive language.

of the limits which ought to be imposed on such communications, it is essential, in the first place, to inquire, as to the nature and extent of the evils which render such restraints necessary, or at least expedient.

This consideration immediately leads to a very important and characteristic distinction between such evils as are occasioned by an abuse of these faculties, first, *to individuals in particular* (1), and secondly, *to society in general*. In law, as well as medicine, it is natural to suppose, *à priori*, that different evils would require different remedies.

The most serious and dangerous form in which an injury of this nature can affect *an individual*, is, that of a false accusation of a crime; especially where it is aided by false testimony, in a court of justice, by which the property, liberty, or even life of the accused is placed in direct and immediate jeopardy. The making a false charge, even where it does not end in a legal assassination, by the death of an innocent party,

(1) When the injury is principally to the individual, it is obvious that, on grounds of natural justice, compensation ought to be made to him; and where the awarding damages to the individual injured is a sufficient restraint, it would be inconsistent with the first principles of civil liberty to inflict a further penalty by fine to the state, or the imprisonment of the offender, simply for the reason, that such further restraint is unnecessary; and therefore penal, as contradistinguished from civil liability, ought not to attach, unless either where restraint is necessary, and no individual in particular is injured, as in the case of a blasphemous or immoral publication, or where, though an individual be injured, yet the public are also injured or placed in jeopardy, either by the means of annoyance used,—or because the private remedy is in itself an insufficient restraint, in consequence of the difficulty of enforcing it.



is so enormous a crime in its consequences, and so odious and atrocious an abuse of the forms of justice, as to render it probable that this species of defamation would attract notice and punishment in very early times; and it is remarkable that the first denunciation against slander, in the Mosaic law, seems to be coupled with a specific denunciation (*m*) against judicial calumny, afterwards more emphatically repeated in the Decalogue.

Such practices, which tend immediately to the privation of property, liberty, or even life itself, are formidable in proportion to the probability that they will be successful; and, therefore, although they must at all times, and under all circumstances, be highly dangerous, yet is it obvious that they are the more particularly to be dreaded, whenever the means of judicial investigation are still imperfect and inadequate to the attainment of truth (*n*), or in a subsequent stage of society,

(*m*) Thou shalt not raise a false report; put not thine hand with the wicked to be an unrighteous witness. Exod. c. xxiii. v. 1. See also Deut. xxvii. 25.—And though, by the law of England, judicial perjury is accounted but a misdemeanor, unless, indeed, it be used as the successful means of taking away the life of an innocent person, yet, by the laws of many nations, it has been punished capitally. By the law of the Twelve Tables, a false witness was thrown from the Tarpeian rock, *si falsum testimonium dicassit saxo dejicitor*, Gell. xx. Afterwards the punishment was arbitrary; l. 16. D. de testibus.—SEN. v. 25. s. 2. Except in war, where a false witness was beaten to death with sticks by his fellow-soldiers. Polyb. vi. 35. The Libellus Famosus, or false and anonymous charge of a capital crime, was, by many later laws, punished capitally.

(*n*) It is the ordinary policy of a barbarous and illiterate people, to

when, for purposes foreign to justice, false accusers are listened to and encouraged (*o*).

A man may also be placed in a state of legal jeopardy by means of slander which affects him indirectly in a judicial proceeding. This may occur in all cases where the law admits evidence of a man's general good character (*p*), for the purpose of rebutting the presumption of guilt on a criminal charge; for, by the propagation of calumnious reports, he may be unjustly deprived of the advantage which the evidence of good character would other-

substitute artificial and arbitrary proofs of innocence or guilt in the place of careful and rational investigation. Hence the superstitious modes of trial by the Saxon ordeal and Norman combat, and the doctrine of compurgation, or law wager, which, even at this day, is permitted by the law of England.

(*o*) Witness the legal assassinations which were effected among the Romans, when "*ut quis districtior accusator velut sacrosanctus erat.*" And also by means of the *Libellus Famosus*, or secret charge of a capital crime. So fatal had such accusations become, that the authors of them were justly made amenable to capital punishments by numerous provisions.

(*p*) As the law of England does. Formerly, common fame that a man had been guilty of an offence, was sufficient ground, by the law of England, for putting him on his trial, without any other preliminary inquiry. Among the Romans, witnesses to character were called *laudatores*, and if the accused could not produce at least ten of these, it was deemed better to produce none.—*Quam illum quasi legitimum nutrum consuetudinis non explere.*—Cic. Verr. v. 22. and see Cic. pro Balb. 18. Cluent. 69. In the rude and barbarous times of our Saxon ancestors, where compurgation was a species of trial, and when an accused party was deemed to be innocent, without further inquiry, because a specified number of witnesses swore that they believed him to be so, character and reputation, if respect was really paid to such oaths, must have been of infinite importance.

wise have afforded. The destruction of character, in such a case, would not only affect a party directly, by depriving him of that evidence which he might have used positively to his advantage, but negatively and indirectly also, by raising the inference, that he is a man of absolutely bad character.

To this extent may an individual be injured by false charges, through the medium of judicial proceedings. In the next place, although the value of character, and its intimate connection with every benefit and advantage which social life can confer be obvious, yet, in order to appreciate fully the extent of the evil which may result from privation of character and the nature of the remedy which ought to be awarded in respect of such an injury, a few observations may not be wholly superfluous.

A state of civil society is in effect one great system of mutual aid, trust, and confidence (*q*), by which mankind

(*q*) The first principle of civil association, the *mutuum beneficiorum commercium*, is described by Seneca, with such beauty and simplicity that little excuse is requisite for transcribing the passage:—

Quo alio tuti sumus quam quod mutuis juvamus officiis? hoc uno instructor vita contraque incursiones subitas munitior est beneficiorum commercio. Fac nos singulos quid sumus? præda animalium et victimæ ac bellissimus et facillimus sanguis. Quoniam cæteris animalibus in tutelam sui satis virium est: quæcunque vaga nascuntur & ætura vitam segregem armata sunt. Hominem imbecillitas cingit, non unguium vis non dentium terribilem cæteris fecit, nudum et infirmum societas munit. Duas res dedit quæ illum obnoxium cæteris validissimum facerent rationem et societatem. Itaque qui par esse nulli poterat si seduceretur rerum potitur. Societas illi dominium omnium

are bound together. Each individual, whatever be his rank, his talents, or his wealth, considered as a single and isolated being, is weak and helpless, each must depend on others, not only for the comforts, but even for the necessities of life, for security of person and of property. He must trust to his lawyer for the preservation of his property when it is claimed by an adversary; to his physician in time of sickness; to his servants for the faithful discharge of the ordinary, though meaner duties of life. But the reposing of confidence implies the selection of agents competent to the discharge, as well of the higher and more important duties of a public nature, as of the ordinary and private duties of society. With the exception of those high public offices, which, on grounds of civil policy, are, by the constitution of the particular state, decreed to be hereditary, the appointment must be matter of selection and choice vested in the government, or in the people, or in individuals specially delegated to the trust, and every member of society must be left to exercise his own discretion in selecting those whom he may chuse to trust in the varied connections of life. Now, it is obvious, that it seldom can happen that the power of selection can be properly and discreetly exercised on the mere personal knowledge of any single individual, founded on his own actual experience. It is constantly

*animalium dedit: societas terris genitum in alienæ naturæ transmisit imperium & dominari etiam in mare jussit. Hæc morborum impetus arcuit, senectuti adminicula prospexit, solatia contra dolores dedit. Hæc fortes nos facit quod licet contra fortunam advocare.— Hanc societatem tolle et unitatem generis humani quâ vita sustinetur scindes. Senec. de benef. l. 4. c. 18.*

necessary to place reliance on the knowledge and information of others, not only in those instances where choice is to be made of public functionaries, but even in those ordinary and daily instances, where every man reposes trust and confidence in others, with a view to his own interests and private concerns. Whether a house is to be built, or a surgical operation performed, a suit to be commenced, or a farm to be purchased, it rarely happens that the party interested in selecting his architect, his surgeon, his solicitor, or surveyor, does not place some reliance on information, which he derives from others, as to the skill or integrity of the agent whom he elects to employ.

Again, every one who trusts another, usually possesses both the inclination and the means of forming some estimate of his abilities and principles; and though the opportunities of each observer may be limited, yet if all who know the party so trusted concur in forming the same general conclusion on the subject; if they all agree in stating that he is skilful, diligent, faithful, and honourable in his dealings; that general coincidence in opinion of many possessed of the means of judging, affords a reasonable degree of probability in favour of the correctness of their conclusion. Hence it is, that where a trust is to be reposed, and a selection made, the party who is to exercise it may fairly rely not only on the particular and actual experience of other individuals, but also on *general character* derived from the united experience of others.

Such, then, being the close and intimate connection between character and temporal preferment or acquirements, two circumstances are to be noticed, for the pur-

pose, of showing how peculiarly susceptible character and reputation are of injury, and how easily confidence in an individual is destroyed or intercepted by slight causes; and, consequently, of inferring the general necessity, not only of protecting reputation by municipal provisions, but also of devising such as are adequate to the exigency of the occasion.

In the first place, it is to be remarked, that good character is but *presumptive* evidence of good principles; whilst, on the other hand, the commission of a single dishonourable or unworthy action is *demonstrative* of bad ones. Hence it is that the report of a *single act* of delinquency, if credit be given to it, at once is fatal to the most exalted reputation.

The character acquired by an exterior of probity exhibited to the world for half a century, necessarily yields at once to the proof that the party is at last guilty of a single act of dishonesty.

In the next place, as far as reputation and confidence in character are concerned, *slight suspicion* is usually attended with the same evil consequences, with belief, founded on actual proof, and suspicion is thus equivalent to proof. For where even a slight suspicion, as to a man's conduct or principles, is once excited, he who would otherwise have reposed confidence, must either proceed to do so, notwithstanding the suspicion which prevails, or remove all doubt by inquiry and investigation, or withhold his confidence altogether. To trust blindly, and without inquiry, as to character, would usually be deemed rash and imprudent; but to do so, after an actual though obscure warning, would be an act of folly and imprudent weak-

ness, where a man's own interests were concerned, and of real injustice, where the interests of others were involved. To inquire and investigate would usually be a work of labour, trouble, and difficulty, in which few care to engage; and thus it would seldom happen that the party whose duty or interest it was to make the selection, would not adopt the third alternative, and withhold his confidence from one to whom a suspicion, however slight, attached, to repose it in another whose character was untainted. If one, about to deposit a large sum of money in the hands of a banker, were casually to hear that he had committed an act of bankruptcy, what course would be the natural consequence? To trust without inquiry would be absolute folly; to investigate the truth of the report would, at all events, be irksome and troublesome, and, after all, might be unsatisfactory; the natural result would be, that he would chuse to employ some other depositary, who was placed beyond the reach of all doubt and suspicion. But as one acted, so would all, and thus a false alarm; originating in private malice, might be adequate to the destruction of credit and consequent ruin.

Again, although the municipal law of the land may afford security of person and of property to all, yet is there a large and inestimable portion of good, which arises from a state of civil society, a participation in which cannot be positively conferred or secured by any laws, and the enjoyment of which cannot be protected, except negatively and collaterally, by the restraining such injuries to character as tend to destroy it. That constant reciprocation of good offices, of mutual aid and friendship, which constitutes the great charm and bless-

ing of social life, and which depends on the exercise and influence of the ordinary feelings of kindness and benevolence, can be but remotely influenced by any municipal regulations. But as no man of honour or reputation would willingly connect himself with base and unworthy associates, imputations on a man's conduct or principles necessarily tend immediately to debase and degrade him from the situation he holds in the favour and esteem of others.

To exalt a man's reputation in society is to ensure to him the respect and affection of mankind, and to lay open the avenues to prosperity and honour; to degrade and disgrace him is to banish him to a state of wretched solitude and destitution<sup>(m)</sup>, to render him the very scorn of men, the outcast of the people,—a condition lower than that of the brute which enjoys its mere animal life, unembittered with the painful sense of degradation, dishonour, and contempt.

Now, although municipal laws cannot properly interfere to direct, or control men in their ordinary intercourse and mutual transactions, but leaves each at liberty to exercise his own discretion, and, consequently, although such laws cannot, by any positive and direct interposition, secure to an individual the advantages, benefits, and comforts, to which his conduct in society may justly entitle him, yet the law not only may, but ought to interfere, to protect him from unjust and malevolent aspersions which deprive him of the benefits and advantages in which, as a member of the community, he ought to participate.

(m) *Nulla interimento sed cunctis aversantibus et commercia etiam sermonis negantibus.*



The law cannot compel individuals to consult the most skilful physician; it must be left to a patron to select, in his discretion, the most worthy object for bestowing preferment; but, though the law cannot, in any such instances, ensure success to the most deserving, but must leave it to depend on the discretion and consciences of individuals, yet it may, on the soundest and most obvious principles of justice, interfere to prohibit false and injurious charges of ignorance, dishonesty, or profligacy, which tend to exclude such parties from enjoying that degree of success to which their merits justly entitle them.

The right, then, of every man to the character and reputation which his conduct deserves, stands on the same footing with his right to the enjoyment of his life, liberty, health, property, and all the comforts and advantages which appertain to a state of civil society, inasmuch as security to character and reputation are indispensably essential to the enjoyment of every other right and privilege incident to such a state.

Assuming, then, that restraint is expedient, with a view to the protection of the private interests of individuals, what is the proper mode and measure and extent of such restraint?

Prohibitory restraints must be either *preventive*, *remedial*, or *penal*.

The very nature of the injury excludes, to a great extent, all merely *preventive* provisions. By the law of nature and reason, a man is justified in repelling attempts at personal violence, by opposing force to force. Injuries to character do not admit of such restraints, they are usually inflicted in the absence of the party whose character is defamed. It is true, that the press

might be subjected to censorial restraints, which could not be applied to oral or written calumnies; the policy, however, of this species of restraint, as well as the principles of *penal* coercion, will be more conveniently considered hereafter.

The most obvious and practicable mode, indeed the only one which merits consideration, consists in the awarding a *pecuniary recompense* in *damages*. It may, however, be proper to remark, that, although the very nature of the injury excludes a remedy by restitution, yet, that attempts have been made among some modern nations, to award a proximate kind of remedy, by compelling the calumniator to pronounce a *palinode*, or recantation, of his slander. It may suffice to remark, that this is at best a remedy of a very doubtful and unsatisfactory description.

The sincerity of an extorted recantation must necessarily be stamped with suspicion. It is obvious, that the degree of credit which it deserved would bear an inverse proportion to the fine to be paid or punishment to be suffered, in the alternative of the party's refusing to pronounce the required palinode. If A. being adjudged either to acknowledge that B. was not a rogue, or to pay £100, were to elect the palinode, the only safe inference would be that A., for some reason or other, had rather admit that B. was not a rogue than pay the money.

What then are the proper limits to the remedial action for damages? in other words, what circumstances at the least ought to concur to entitle the party to the remedy, and under what other circumstances ought the remedy to cease notwithstanding that concurrence?

The circumstances on which the title to a remedy must depend, are obviously, 1, the injurious *quality* or *consequences* of the calumny; 2, the mode or extent of *publication*; 3, the *motive and intention* of the party in publishing; or 4thly, *collateral circumstances* connected with the publication.

In the first place then, as far as regards the *nature, consequences, and quality* of the defamatory matter published, the very notion of compensation implies, that some loss or damage has been occasioned.

It were almost nugatory to remark, that to fix any precise and settled sum or value, as the amount of the fine or damages to be paid by an offender of this description, is the work of early and inexperienced legislators (n), and that the recompense ought always to be

(n) The laws of Solon punished calumniators by an arbitrary fine. Pettit in Leg. Attic. By the law of the Twelve Tables, the injuria in general subjected the offender to pay a pecuniary fine or compensation. "Si quis alteri injuriam faxit, XXV. Æris pœna sunto." The folly and absurdity of making either a fine or compensation fixed and arbitrary, was well illustrated in the instance of Veratius, or Neratius, a rich Roman, who took great delight in walking through the streets of Rome striking all those whom he met, according to his fancy and caprice; he was followed by a servant loaded with money for the purpose of immediately paying the appointed fine to those whom he had thus insulted. Gell. Noct. Att. XX. 1. It may fairly be presumed, that he was a strong man as well as a rich one, or that the fine and blows would speedily be returned, the latter with interest, and that he would literally be repaid in his own coin. The absurdity of annexing an invariable compensation to a variable injury, naturally occasioned a more equitable law. Prætores postea hanc pœnam abolescere et relinquere censuerunt injuriis qui æstumandis recuperatores se daturos edixerunt. Gell. Noc. Att. XX. 1. Heinecc. Ant. Rom. Ad Inst. Lib. 4. tit. s. 5.

apportioned to the actual extent of an injury which is so uncertain and various in its consequences.

The remedy then is applicable, and ought, in point of natural justice, to be applied, unless there be some extrinsic reason to the contrary, in all cases where a party has suffered any actual loss or detriment in his person or property, from a wilful act of slander. And this principle extends not merely to all cases where the party has been deprived of some actual legal right, but to all others where any social benefit has been intercepted which he would otherwise have enjoyed, although he could not have claimed it as an absolute and vested legal right. Thus it extends not only to the case where a man, by malicious slander, suffers a temporary privation of his personal liberty, to which he has an absolute legal right, but also to that of a clergyman whose presentation to a benefice has been hindered by such means.

For although the law cannot interfere for the purpose of enforcing the moral obligation on the part of the patron, to prefer the most deserving candidate, but necessarily leaves the choice to his conscience and discretion, yet it may properly interfere for the protection of character, and to compel a compensation in respect of a loss or damage, immediately consequential on a wilful privation of character.

The party defamed had no legal title or perfect moral right to be preferred, but he had, in point of natural justice, a *right to the character* which his conduct deserved, and consequently a right to compensation for the mischief occasioned by one who had wrongfully defamed him. This general principle obviously em-

braces every instance where the slander occasions any loss whatsoever, capable of pecuniary admeasurement.

But, in the next place, ought the remedy to be confined to those instances, where it can be shown that some *actual specific loss* or damage has been sustained in consequence of the calumny; or, if not, within what limits ought the remedy to be extended.

It would; in the first place, be highly inconvenient and inexpedient to make actual damage essential to the action, without regard to the obvious and immediate tendency of the defamation to occasion great, it may be irreparable injury. In ordinary instances it may be sufficient that the law should provide a remedy for a mischief already suffered, without presuming or anticipating any future evil consequence. Be this as it may, the peculiar nature and tendency of an injury to reputation renders it convenient, if not essential, that, in some instances at least, a remedy should be given in respect of calumnious imputations upon character, though no actual consequential damage can be proved. That is, it is desirable, if not necessary, under certain limits, to constitute the defamation a substantive and positive injury, independently of the proof of consequential damage.

Were it otherwise, if actual loss were invariably essential to the remedy, the damage occasioned would frequently be irreparable. One of the peculiar and striking characteristics of this species of injury is the difficulty, or rather the impossibility, of estimating its noxious consequences, and adducing proof of actual mischief during its ruinous and destructive progress.

If a physician, attorney, or merchant, could not obtain a remedy in respect of calumnious reflections upon

his character or credit, until he could adduce specific instances of losses occasioned by such attacks, he might be effectually ruined before his proof was complete. Slander tending to the disinherison of the party calumniated, affords a strong illustration of this doctrine. If it were to be maliciously suggested to the proprietor of a large family estate, that his heir apparent was illegitimate, such a report, if believed, might strongly tend to induce the owner to devise his property to another branch of the family of undoubted legitimacy. Now if the heir apparent were not permitted to complain of the wrong done him, until the injury had been consummated and completed by his disinherison, the remedy would frequently be afforded in vain; it would be most difficult to prove that he had been disinherited in consequence of the slander, and even if he could prove the fact, the author of the mischief might be unable to yield compensation and thus a serious and cruel injury would be left without a remedy. On the other hand, by regarding the slander as a substantive injury, the party aggrieved is entitled to arrest the progress of the mischief in limine; by means of an action against the author or publisher of the scandal, he challenges him to produce formal proof of his charges; he establishes their falsity, if they be false, and obtains reasonable damages for the trouble, anxiety, expense, and danger to which he has wantonly been exposed, and the mischievous effects which might otherwise have accrued from the slander are averted.

Is then the remedy to be extended indefinitely, though no special damage can be proved, to every species and degree of defamation which tends to the occasioning of

some loss or damage; and if not, where is the limit to be assigned?

To extend the remedy indefinitely to all communications tending to produce damage, and *à fortiori* to award a pecuniary recompense in respect of such contumelious and insulting language as was not likely to produce temporal damage, though it tended to hurt the pride or delicacy of the offended party, would, it seems, be highly inexpedient.

For, in the first place, as it is difficult to say that any undeserved imputation on a man's moral conduct, character, or temper, does not tend to dislodge him from his state and condition in society, and thus remotely at least to deprive him of temporal comforts and advantages, it is plain that so wide an application of the principle would afford far too large a scope for vexatious litigation, and the ordinary intercourse of society would be impeded and fettered by the apprehension of vexatious and harassing suits for trifling causes.

Abusive, insulting, and unmannerly language, which affect not a man's liberty or estate, are of too indefinite and uncertain a character to be the subject of an action for pecuniary damages (*s*). Such injuries, or rather affronts to the feelings, are as incapable of definition as of admeasurement. They depend on the rank, situation, and condition of the parties, and on circumstances which may be felt but not defined; they may depend

(*s*) Contumelia minor est injuria quam queri magis quam exsequi possumus, quam leges quoque nullâ dignam vindictâ putaverunt.

on the tone of voice, the gestures, even looks by which they are accompanied, and in some instances silence may be more contemptuous and insulting than direct expressions (†).

It seems then that it is expedient, on principles of general policy and convenience, that the law should define, by sufficient limits, in what instances simple defamation, unaccompanied by special damage, should constitute a substantive ground of action. It is obvious that the application of these principles, in particular instances, must in a great measure depend on the state and circumstances, manners and habits, of the society for whose use such rules are to be applied.

There is, however, one consideration of external policy which always operates in favour of the extension of the action. Experience has fully proved that to refuse, or even to restrict the civil remedy within too narrow limits, is sure to occasion personal conflicts and bloodshed; the ordinary transition is *a verbis ad ver-*

(†) The Roman law which made the *personal insult or contumely* the basis of the action, civil as well as criminal, was exceedingly vague and indefinite; see the observations below, p. xxxi. By the law of England no action lies in respect of *the speaking* of mere general abusive words which are not followed by special damage, neither are such words indictable, unless in some special cases, as where they amount to a challenge, or affect a court or magistrate in the execution of public justice, or are applied to the magnates of the realm. The only mode of proceeding by the law of England, in respect of abusive, and unmannerly and insulting language in general, is by causing the offender to be bound over to the good behaviour. The ancient restraints on scolds, the ducking stool and the bridle, whether it be that the one sex is grown more gallant or the other less virulent have long fallen into disuse.



*vera*, men being always apt to carve out their own remedy in such cases where it is denied by the law. And though this consideration operates principally as an argument for subjecting calumniators to penal censure, inasmuch as such insults tend immediately to produce public mischief and disorder, yet is this consequence by no means to be overlooked in relation to the civil remedy; for no provision can more surely tend to restrain individuals from avenging injuries to their reputation than to have the means afforded, not merely of obtaining redress and compensation, in the shape of damages, which is frequently but a secondary consideration with an injured party, but also, which is usually of infinitely greater importance, of vindicating their characters, by openly challenging their accusers to proof of their assertions. This mode of vindication, which for reasons which will afterwards be adverted to, cannot be permitted when the proceeding is purely of a criminal nature, necessarily occurs where the very essence of the injury consists in the *falsity* of the accusation.

It is further to be observed, that in this, as well as other instances, where a general rule in the affirmative or negative cannot be adopted, but where it becomes necessary to define the legal boundaries, it is always more important, as a matter of legal policy, to adopt plain and general distinctions, for the sake of clearness and notoriety, although some other consideration of policy should be partially sacrificed, than to draw a line more nearly adjusted and suited to conflicting principles, but of greater intricacy, obscurity, and difficulty. For it is obvious that the quantity of mischief and inconvenience which may result from adopt-

ing an indistinct rule, or ill-defined boundary, may far exceed any evil which could result from the partial (u) sacrifice.

(u) The law of England defines, with much greater distinctness than is usually found in other codes, the limits of the civil action for *oral* slander in the absence of special damage. 1st. The remedy is afforded in respect of a charge of an offence visitable with corporeal punishment. 2ndly, An imputation [of labouring under some particular infectious disorders. 3rdly, Imputations which affect a party in his office, profession, trade, or means of livelihood; or, 4thly, Aspersions which tend to his dishonour. The law is less definite in two instances: 1st, in respect of slander against the magnates of the realm, or *scandalum magnatum*, where the remedy is given by several ancient statutes, in respect of calumnies against the characters of *grandees*; and, 2ndly, in the instance of written slander or libel, for, contrary to the principles of common law, general insulting and contumelious expressions are the subject of an action, when the communication is in writing, though the same words would not have been actionable, had they been merely spoken. This anomalous appendage to the common law principle, which regarded not the contumely and insult so much as the loss to the parties estate and means, seems to be plainly attributable to the doctrines of the civil law, which were first imported into the Star Chamber practice, in cases of libel, and after the abolition of that court, were, in part at least, recognised by the courts of common law; and by this means the action for written slander is of very indefinite extent. See vol. 1, p. 148.

The ground of the action, under the ancient Roman and civil law, was the *injuria*, the personal insult or contumely offered to the party defamed; and hence it was that the limits of the action, according to the Roman law, were very indefinite and indistinct. *Ait prætor qui adversus bonos mores, convicium cui fecisse, cujusve operâ factum esse dicitur quod adversus bonos mores convicium fiat, in eum judicium dabo.* D. l. 47, 10.

Again, *ait prætor ne quid infamandi causâ fiat, si quis adversus ea fecerit prout quæque res erit animadvertam.*

Again, *Generaliter vetuit prætor quid ad infamiam alicujus fieri.*

*Proinde quodcumque quis fecerit vel dixerit ut alium infamet erit actio injuriarum.*

Some curious instances are given in the digest of the application of these principles of the Roman law. Item si quis pignus proscripserit venditurus tanquam a me acceperit infamandi mei causâ. Si quis non debitorem, quasi debitorem appellaverit injuriæ faciendæ causâ, injuriarum tenetur.

Another illustration presents a very singular mode of defamation, which arose out of the practice which prevailed at Rome, for the relations of an accused party to dress in sordid habits, and allow their beards to grow, in order to excite compassion and favour towards the accused. Hence it was that a party intending to defame another accomplished his object by assuming a squalid and abject appearance, under pretence of supplication for one accused of a heinous crime. *Hæc autem ferè sunt quæ ad infamiam alicujusque fiunt. Ut puta ad invidiam alicujus veste lugubri utitur aut squalidâ aut si barbam demittat vel capillos submittat, aut si carmen conscribat, &c.*

Many incidents were founded on the doctrine of the Roman law, that contumely was the ground of action, in which it differs from the law of England. If an infant, or one in a state of intoxication, defamed another, the action failed, for the mens rea, the contumelious intention, was wanting; in England, such a defence, if the act were voluntary, would be unavailable.

By the Roman law, a party was not only entitled to sustain an action for contumelious words spoken concerning himself, but also in respect of those spoken of others of his family, if they tended collaterally to subject him to degradation and contempt.

Thus, a father was entitled to recover, in respect of a contumelious injury offered to his wife, children, or domestics, provided the offender knew the relationship of the party so offended. Heineccius, pt. 7. sec. 118. So far was the principle carried by the Roman law, that even the heir was entitled to an action for an insult to the remains, or even the memory of the deceased. *Et si forte cadaveri defuncti fit injuria cui hæredes bonorum possessores exstitimus, injuriarum nostro nomine habemus actionem. Spectat enim ad existimationem nostram si quæ ei fiat injuria. Idemque et si fama ejus cui hæredes exstitimus læssatur.*

The same degree of indefiniteness which characterises this branch of the Roman law, naturally pervades, also, the codes of those nations who have adopted the principles of that law. In Scotland, for instance, the limits of civil as well as criminal liability are exceedingly wide. Thus, in the case of *Aitken v. Read and Fleming*, 2 Mur. Rep. 149, (cited in Mr. Borthwick's learned and valuable Treatise on the Law of Libel in Scotland, p. 184,) the judge observed, "There are disadvantages in allowing actions of this sort, where there is no accusation of a crime, or allegation of specific damage. By the law of Scotland, however, *any thing defamatory* is the foundation of an action." In the case of *Mackenzie v. Read*, 2 Murr. Rep. 159. Borthw. 184, the court, after observing that the law on the subject of slander, in England, was very particularly defined, added, *here*, any thing that *produces uneasiness of mind*, is actionable.

Several instances are cited by Mr. Borthwick, in his excellent work, p. 186, of suits commenced and sustained on very slight grounds. In *Memis v. Jop and others*, Dr. Memis instituted an action against the defenders, in order to obtain redress for the alleged injury of having caused his designation, "*Medicinx doctor in Aberdonia*," contained in the charter of the infirmary, to be translated "*Doctor of Medicine in Aberdeen*," instead of *physician* in Aberdeen. The action was sustained; but, after *years of litigation*, the defenders were assolizied. In the conclusion of his report, Mr. Tait observes, "That there was no strong animus injuriandi to hurt Dr. Memis seemed admitted; at the same time, it appeared a conduct rather peevish and uncivil in his brethren, and an intentional affront to refuse to gratify the doctor in this request. But the lords thought *that they did not meet to decide what was civil, but what was wrong*. In this case there was no wrong. The translation was good; no damage had followed, or could follow upon it, therefore the action was foolish and wrong-headed."

The *code penal* of France visits with penal censures, all calumnies uttered in public places, or published in writing or in print, which impute facts which are the subject of criminal or correctional process, or which would expose another to the contempt or hatred, *au mepris ou à la haine*, of the citizens :—

Next, as to the *quality* of the matter published. Assuming, then, that the defamatory matter complained of either produces or immediately tends to produce actual damage, ought the *falsity* (*u*) of that which is published

If the fact imputed be punishable with death, perpetual hard labour, or deportation, the calumniator is liable to imprisonment for from two to five years, and a fine of from 200 to 5000 francs. In other such cases, to an imprisonment of from one to six months, and a fine of from 50 to 2000 francs.

Injurious expressions, which impute a vice but no precise fact, if so published, subject the offender to a fine of from 16 to 500 francs.

All other injurious and outrageous expressions, which want the double character, de gravité et publicité, are delicts of simple police.

The *veritas convicii* cannot be pleaded generally; on the contrary, every imputation is presumed to be *false* which is not legally established in the due course of law, but if pending a proceeding for such a calumny, the defendant shall denounce the complainant, proceedings shall be stayed till that charge be decided.

And in case the fact imputed shall be proved to be true, the author of the imputation shall be exempt from all punishment.

(*u*) By the laws of Solon, it was forbidden to defame another in public places, under a penalty of three drachmas to the party injured and two to the treasury. *Legē sanxit Solon ne quis de alio detrahat in locis sacris in judiciis, in magistratuum concessibus, & in spectaculis, qui secus faxit ei de quo detraxit multam pendat drachmas tres, & aerario publico duas.* Pettit. in *Leg. Att.* 535.

In such instances, the truth or falsity of the charge seems to have been immaterial, the compensation was paid in respect of the public insult. In other cases, a fine of two drachmas, as it seems, was imposed, in respect of mere light and trivial charges, whilst, in respect of graver ones, and where a crime of legal cognizance was charged, a

to be essential to the remedy; in other words, ought its truth to afford an answer to the claim, either abso-

much heavier fine was imposed. But, in either case, the fine was conditional, viz. unless the defendant proved his charge to be true. The law was *των λεγόντων κακῶς ἢ μὴ ἀποφαίνεσθαι ὡς ἴσιν ἀληθῆ τοις κρημασζομένοις*. Qui de alio detrectaverit, ni probarit verum esse quod objecit probum, multator. But it was enacted, *τοὺς λεγόντας τι τῶν ΑΠΟΡΡΗΤΩΝ παντακουσίας δραχμῶν ὀφείλουσιν*. Non licebat igitur alteri exprobare ea quæ si quis patrasset in eum insurgere leges & animadvertere nisi, *ἀποφαίνουσιν ὡς ἴσιν ἀληθῆ* posset apud iudices. Pettit. ib.

In respect of some other specific charges, a fixed penalty was also payable. Vetitum quoque lege erat alteri objicere quod clypeum abjecisset qui hoc convicium fecerit quingentis drachmis multabatur.—*ΕΑΝ ΔΕ ΤΙΣ ΦΑΕΚΗ ΑΠΟΒΕΒΑΗΚΕΝΑΙ ΤΗΝ ΑΣΠΙΔΑ ΤΥΘΑΙΚΟΝ ΕΙΝΑΙ*.

The same laws also contained an express provision against a calumnious charge of homicide. Nam homicide omnibus civitatis juribus sacris pariter & publicis excidebant, ita ut ne illos quidem alii alloquio dignarentur. Pettit. ib.

Whether, according to the Roman law, the truth of a defamatory charge made against an individual afforded a complete defence, without reference to the motive and intention of the publisher, has, it is well known, been doubted. And yet the authorities seem to weigh strongly in favour of the affirmative of the question, as well as in reference even to the criminal as to the civil action. The general doctrine appears most clearly, from the celebrated response of Paulus, which was imported into the digest. "*Eum qui nocentem infamavit non esse bonum equum ob eam rem condemnari peccata enim nocentium nota esse et oportere et expedire;*" for though, according to Matthæus, "*Selet Paulus in disserendo, σκοτικός seu obscurus esse;*" yet his meaning is in this instance too plainly expressed to admit fairly of any doubt, notwithstanding the interpretation attempted to be imposed upon the words by his numerous commentators. Some of them have asserted, that the response must be limited to the charging offences, the

lutely or with qualifications. By the law of England, which, in this respect, conforms with, as it seems, the

detection of which is of importance to the state; but the plain and obvious meaning of the terms repels such a restriction; the word *peccata* naturally comprehends every species of delinquency, whether it be against law or morals, and is not confined to the *admissum crimen*, or *delictum*, by which legal delinquency is so frequently described.

Thus Matthæus, in his treatise *De Criminibus*, cap. 1. makes *peccatum* the genus, *crimina & delicta* species, and he observes “*sunt peccata quædam ita levia ut ea queramur magis quam exequamur ut legibus quoque nulla sit imposita pœna, cujus generis si quis requirat inueniat sequentibus locis, l. si quis 14. § Divus D. de Relig. et sunt fun. l. 3. § non perpetuæ, D. de sepul. viol. l. verum est. 39. D. de furt, sunt alia quæ legibus vindicantur non unâ tamen omnia severitate.*” These and many other authorities, which might if necessary be cited, show clearly that the *peccatum* of Paulus was not to be restrained to the highest and most penal offences. See *Cic. de Finibus*, 4. *Horat. Sat. 1.* Even if the sense were doubtful, it would be absurd to adopt a construction the effect of which would be to permit a man to justify by proving the truth, where he had imputed the commission of a monstrous crime, but to exclude him from a similar defence when he charged one of inferior magnitude. If a man may justify a charge of murder, by proving it to be true, why should he not be permitted to do the same when he has imputed robbery or theft. If the public are interested in knowing the character of a murderer, have they not also some interest in knowing that of a thief? The reason for allowing truth to operate as a justification, is still stronger where the alleged slander does not impute any misconduct of legal cognizance; for there the public cannot be put on their guard by means of a judicial charge. Others again have urged that the response must be construed with the annexation of this condition, that the imputation be not made *animo conviciandi*. And the rescript of Dioclesian and Maximian has been cited in support of this limitation. “*Si non convicii consilio te aliquid injuriosum dixisse probare potes, fides veri a calumniâ te defendit. Si autem in rixam inconsulto calore prolapsus homicidii convicium objecisti, et ex*

rule of civil law, the truth of the alleged slander is an absolute answer, or bar, to the claim to damages.

eo die annus excessit, cum injuriarum actio annuo tempore prescripta sit ob injuriæ admissum conveniri non potes." The true construction of the words *fides veri*, seems clearly to be, not as some would have it, that the truth shall be a defence, provided the alleged slander was not published with intent to defame, but that proof of the absence of such an intention shall be a defence. The words *fides veri* do not refer to the proof of the truth of the defamatory matter, but to proof of the circumstance stated by Victorinus, namely, that he had imputed the crime of homicide,—non convicii consilio. C. Victorinus had inquired whether he should be amenable if he could prove that he uttered the words without the animus infamandi? The answer was, that if he could establish the truth (not of the charge but) of the circumstance which he relied on, i. e. the absence of an intention to defame, that proof would serve for a defence. It is scarcely necessary to observe that the plain and literal construction of the words of Paulus derives confirmation from the celebrated dialogue between Horace and Trebatius.

Trebatius: "*Sed tamen ut monitus caveas, ne forte negoti  
Incutiat tibi quid sanctarum incititia legum.  
Si mala condiderit in quem quis carmina jus est  
Judiciumque.*"—

Horatius. "*Esto si quis mala, sed bona si quis  
Judice condiderit laudatur Casare, si quis  
Opprobriis dignum laceraverit integer ipse.*"

Trebatius: "*Solventur risu tabulæ: tu missus abibis.*"

The very nature of the penalty imposed on a libeller, by the Cornelian law, supplies an argument tending to a similar conclusion: he was to become *intestabilis*; that is, incapable of giving testimony in a judicial proceeding. But why *intestabilis*, if he had published merely the truth? To exclude one from giving testimony who had by a *false* and malicious charge attempted to deprive another of his character,



But in some other countries, even those which recognise the authority of the civil law, the truth of the ca-

would at least be a consistent and plausible provision, but it would be a strange reason for rejecting a witness, that he had published what was *true*, even though he had done it maliciously.

With respect to those judicial but anonymous charges of capital offences which came within the description of *Libellus Famosus*, (see the *Constitutions de Libellis Famosis* in the Theodosian Code, particularly the 4th and 5th.) the author, when discovered, not only might, but was obliged, at the peril of his own life, to prove the truth of the charge. Thus, according to the first constitution in the Theodosian code, “*Si quando famosi libelli reperiantur nullas exinde calumnias patiantur ii quorum de factis vel nominibus aliquid continebunt, sed scriptionis auctor potius reperiat et repertus cum omni vigore cogatur his de rebus quas proponendas credidit comprobare, nec tamen supplicio etiam si aliquid ostenderit subtrahatur.*”

It is observable that the latter branch of this constitution directed that the author of the anonymous charge should not escape without punishment, even though he proved the charge to be true; yet this was no doubt intended to be awarded in respect of his misconduct in the first instance, in making an anonymous charge, when he was able to convict the guilty party; it does not by any means appear, that, having proved the truth, he was subject to the same degree of punishment as though he had not given such proof; indeed, the very contrary may fairly be inferred. Even this provision found no place in the Justinian code, which, so far from inflicting punishment on the author of the *Famosus Libellus*, when he had disclosed his name and proved his charge, deemed him to be worthy of praise and reward. “*Sanè si quis devotionis sue ac salutis publicæ custodiam gerat, nomen suum profiteatur, & quæ per famosum libellum persequenda putaverit, ore proprio edicat, ita ut absque ullâ trepidatione accedat, sciens quidem quod si adsertionibus suis veri fides fuerit opitulata, laudem maximam et præmium a nostrâ clementia consequetur; sin vero minimè vera ostenderit capitali pœnâ plectetur.*”

Consistently, however, with the response of Paulus, the Roman law contemplated many instances of the convicium and libellus which

lummy is regarded but as a qualified defence subject to several modifications (*x*).

were visited civilly as well as criminally, notwithstanding their truth. Thus it was in all cases where the publication was in its own nature injurious and illegal, and where no advantage was to be derived from publicity. "*Sin autem quod objicitur innotescere nihil interest, puta si alter posnam delicti sui sustinuerit aut in vitium naturale objiciatur claudus aliquis luscus aut gibbosus vocetur, veritatem convicii non excusare quo minus animo injuriandi id factum præsumentur, contrarii tamen probationem hic admittendam.*" Vinn. Comm. in Just. Inst. lib. 4. tit. 4.

The law of England differs from the Roman law in regard to the effect of the *veritas convicii*, in two respects, first, that the former repels the civil remedy in all cases where the imputation is true (except, perhaps, in the case of a conviction and subsequent pardon;) the Roman law, on the other hand, limited the defence to those cases where the public were benefited by the divulcation of the truth. By the Roman law, the personal affront, or contumelia, to which the *consilium conviciandi*, the *animus infamandi*, or *injuriandi*, were essential, constituted the basis of the proceeding criminal as well as civil: the benefit which society would derive from the exposure of evil-doers, was, on grounds of policy, in either case, a legal bar to the proceeding; but it was one which, in its nature, was not available where the imputation was of such a nature that notoriety was unimportant. The law of England on the other hand, considers the damage consequent on the slander, whether actual or presumed, as the basis of the civil remedy, and denies the remedy where the imputation is true; partly, perhaps, adopting the same rule of policy with the civil law, but chiefly, as it seems, on the general consideration that, where nothing more than the truth is published, any damage or loss consequent upon it cannot, in point of natural justice, or at least of civil policy, and on grounds of general utility and convenience, be attributed to the mere publisher of the fact. The same considerations tend to explain another broad distinction between the law of England and the Roman law connected with the present subject; according to the latter, when the truth of the

alleged slander operated as a defence against the civil action, it operated also equally as a defence against the criminal proceeding; whilst, on the contrary, though the law of England constitutes the truth universally a bar to the civil remedy, yet the general rule is, that this consideration affords no defence upon a criminal charge. The civil law made the personal insult or contumely indiscriminately the basis of criminal and of civil liability, consequently the justification, which on grounds of public policy exempted a party from liability in the civil proceeding, operated with at least equal if not greater force to protect him from penal consequences. The law of England, on the contrary, places civil and criminal responsibility on distinct grounds, regarding the mischief to the private individual as the basis of the former, the mischief to society the foundation of the latter; and though, in the criminal proceeding, the law does not by any means lose sight of the consideration that the public is benefited by the exposure of delinquents, and on this ground as it seems does not visit mere oral defamation penally, yet in case of written defamation the mischief which would result to the public, for want of restraint, is the ground of imposing restraint, and this operates even where the defamatory matter is true. The law, in effect, proceeds on a presumption that a greater degree of mischief would result to society from permitting the truth of written slander to operate as a justification in such a case, than that which arises from a partial suppression of truth. But although it is now a well-established rule of the law of England that truth is no defence to a criminal prosecution for calumny, yet it seems to be at the least doubtful whether a different rule did not formerly prevail even in this country.

By a law of Ælfred, the inventor of *slander* was liable to expiate his offence by the loss of his tongue, unless he redeemed it by the price of his head. Si quis *publicum mendacium* confingat et ille in eo firmetur nullâ levi re hoc emendet sed lingua ei excidatur nec minore pretio redimi liceat quam capitis æstimatione. Wilkins, Leg. Ang. Sax. 41. pl. 28. See also the law of Edgar, Lamb, Saxon Law, 64. And by a law of Canute "Et si quis alterum injuriâ diffamare velit ut alterutrum vel pecunia vel vita ei diminuatur si tunc alter *eam refellere* possit perdat linguam suam nisi illam capitis æstimatione redimere velit. Wilk. Leg. Ang. Sax. 186. Bracton, in the reign of Henry

the Third, states the law under the head of injuria nearly in the language of the Institutes.

"Fit autem injuria non solum cum quis pugno percussus fuerit verberatus vulneratus vel fustibus cœsus, verum cum ei convicium dictum fuerit vel de eo factum carmen famosum et hujusmodi." It was, therefore, not improbable that the *veritas convicii* was, in conformity with the civil law, allowed generally by way of plea or exception. Again, from the language of the statutes de scandalis magnatum, the first of which was in the third year of Edward the First, the offence against which they were directed, was the spreading of *false* news, rumours, or tales, and this object plainly appears also from the st. 2. R. 2. st. 1. c. 5. "Of the devisers of false news, and of *horrible and false lies* of prelates, dukes, earls, and barons, and other noble and great men of the realm, or of the things which by the said persons never were *spoken or done, or thought*, &c. it was enacted that none under grievous pain, &c.; whether these be considered as introductory of a new offence, or but as declaratory of the former law, it is not easy to suppose that falsity was a necessary ingredient in order to bring an offender to justice, for scandalizing the magnates of the realm; whilst in ordinary cases falsity was not essential; in other words, that the king and his nobles were worse protected against defamatory attacks than the rest of the community. The earliest judicial authority in this country, for saying that truth is no answer to an indictment for a libel, appears to be the resolution in the case *De Libellis Famosis*, 5 Coke, 125. and from that time the rule, which seems to be one of policy and convenience, has been strictly adhered to.

(x) Whatever of doubt existed among the Roman jurists as to the effect of pleading the *veritas convicii*, and in addition to this, all the doubts created by the conflicting opinions delivered by the numerous commentators upon the Roman law, have been imported into the laws of those countries which have adopted the rules of the Roman law on this subject.

Even the law of England has not unfrequently been obscured by difficulties plainly derivable from this plentiful source. It was long before the distinction was completely settled in this country, that truth was a complete justification in a civil action, though it was no defence to a prosecution for a libel; the doubts on this subject were evidently attributable to the civil law doctrine, which, in a great mea-

sure, confounded civil with criminal liability, and made the same justification apply to either.

The law of Scotland affords a strong illustration of the obscurity and difficulties which have resulted to those who have embraced the doctrines of the civil law and its commentators. Mr. Borthwick, in his very able and excellent work, on the Law of Slander and Libel in Scotland, where he treats of the plea of *veritas convicii* and the obscurity under which it labours, does not hesitate to ascribe that obscurity to the conflicting and unsatisfactory opinions which the commentators on the Roman law have delivered in reference to this subject. He truly says after Matthæus (*De Crim.*) "*Ad glossographos frustra aspexeris garriunt enim magnas nugæ totoque celo aberrant a mente jurisconsultorum Pauli et Ulpiani.*" And he concludes, "Hence we may account for the opposite opinions as to the right to plead, and the effect of proving the *veritas convicii* which have been supported by Scottish lawyers amidst the great learning and infinite ingenuity to be found in the printed pleadings, which have taken place in some of our laws on the subject of libel and slander; they borrowed their authorities, to a considerable extent, from these Glossographi, and the law of England, to which the pleadings in the Scotch cases contain also frequent examples of reference, has, on this point, not served to preserve us from contrariety of decisions; for it also has had its fluctuations as to the competency and incompetency of justifying the charge in cases of defamation." Mr. Borthwick, in tracing the law of Scotland on this subject, refers to two ancient acts of the Scotch Parliament, which, as he justly observes, seem to indicate the favour shown by the common law (of Scotland) to the admission of the plea of *veritas convicii* as an exculpatory defence, even in some instances of criminal prosecutions.

The first of these is the act of 1540. c. 104. "The pains of judges that dois wrong, and of them quha slanders them wrongously" and the act provides that, "gif any manner of person murmuris (defames, see Hume's Comm. 334, 400.) ony judge, temporal or spiritual, alsweil lords of session as utheris and *proovis not the samis sufficiently*, he shall be punished in suitable manner and sorte, as the said judge or person whom he murmuris, and shall pay any pains arbitral at the will of the king's grace for the infaming of sic

persones." And by the act 1587, c. 49. which narrates in the preamble the odious crime of treason, and on the other hand, that "the malicious accusers of *innocent* persons are nocht to be credited, but severely punished, therefore the act proceeds; it is statute and ordained by our sovaine lord and the three estates of the present parliament, that quhaever accuses another person of treason, the party calumniat being called, accused, and *acquite* of the said crime of treason, the accuser shall incur the same crime of treason quhairfo he accused the uther." It has already been observed that the statutes of *scandalum magnatum* which make the *falsity* of the charge part of the description of the offence, and which have been considered to be declaratory of the common law of England, afford probable reason for inferring that, by the ancient common law, falsity was essential to criminality, in case of personal defamation. But though the civil law is recognised by the law of Scotland, it is remarkable that, according to the modern practice in Scotland, the plea that the facts were true, is not a complete answer to a criminal prosecution for libel, (Borthwick's L. L. 250.) and that, even in the cases of contumelious words spoken in the heat of a dispute and to the person's face, the truth of the injurious words seldom absolves entirely from the punishment. Erskine's Principles, b. 4. tit. 4. sec. 45.

To this extent, therefore, the Scotch jurists have deviated from the Roman law, which seems equally to have repelled both criminal and civil actions where the charge was true. With respect to the effect which the law of Scotland attributes to the *veritas convicii*, in civil actions, Mr. Borthwick, after stating the various decisions and opinions upon this vexatissima questio, upon which lawyers of the greatest eminence have differed, adds, that some of them have thought that the law had not arrived at such a degree of maturity, as to possess any general rule upon the subject.

It seems, however, to be a general rule of the law of Scotland, that the truth of the imputation shall never be admitted as a justification, unless some circumstances appear in the case which afford a presumption of the defenders want of malice, or at least to make it appear that whatever his secret feelings were, he acted with a view to some beneficial purpose. And, secondly, that the truth is not admissible, even

The importance and interest which belong to the question, may warrant a few observations tending to show the reasonableness and expediency of the rule adopted by the law of England in this respect—of withholding the remedy in damages in all cases where the imputation is true.

That no right to damages can, on general principles, be founded on a publication of the truth, seems to follow, simply from the consideration that the reason for awarding damages in every such case fails. The right to compensation, in point of natural justice, is founded on the deception and fraud which has been practised by the defendant to the detriment of the plaintiff.

If A. falsely and maliciously allege that B. has com-

to the extent of mitigating the damages where the inference of malice is too strong to be capable of being redargued.

The plain and simple rule of the law of England, which constitutes the truth an absolute bar to the action for damages, seems to possess considerable advantages over the corresponding law in Scotland. Its application is comparatively simple, as depending on the mere matter of fact, whether the charge be true or false; whilst on the contrary, by the law of Scotland, a previous question, frequently of a difficult and perplexing nature, is first to be decided by the court as a matter of law, that is, whether the proof of the fact be admissible or not. The admissibility of the proof, being a question of law for the opinion of the court, must necessarily induce a multitude of decisions, each being in itself a precedent for future ones. And even where the question of admissibility has been decided in the affirmative, proof of the truth, by the Scotch law, is not conclusive, but is merely allowed to operate as auxiliary evidence in order to rebut the inference of malice.

This doctrine of the Scotch jurists, that the truth is material only so far as it redargues or rebuts the inference of malice is obviously founded upon the notion of the civil law, that the essence of the injury consists in the contumely, insult, or personal affront.

mitted a crime punishable by the law, and, in consequence of that false assertion B. suffers imprisonment, he is, in point of natural justice, entitled to compensation, in respect of the injury thus wrongfully occasioned. But if A. were truly to assert that B. had committed that crime, and, in consequence, B. were to be imprisoned and punished, it would clearly be contrary to justice and reason that A. should be bound to make compensation. It would be manifestly absurd and unreasonable that the law should first impose a penalty on B. for his delinquency, and then entitle him to recover the amount, or an equivalent compensation from A. It is, therefore, the deception which has been practised by A., and the *falsity* of his communication that makes the difference, and which constitutes B.'s title to damages. So, in general, whoever wilfully and falsely ascribes misconduct or evil principles to another, is guilty of fraud and deception towards society, which possesses an interest, in truly knowing and estimating the conduct and character of its various members, and is guilty also of an act of injustice towards the individual, because the imputation tends to lower and degrade him from his proper place in society, and to exclude him from the advantages to which, as a member of society, he is justly entitled (y).

(y) The sin and mischief against society may consist in deceitful commendation as well as in unmerited censure. One who falsely and wilfully recommended an ignorant profligate to a patron of a benefice, as a fit and proper person to be preferred, would as much offend against morals and the interests of society, as if he had prevented the preferment of a learned and conscientious man, by maliciously defaming him. The sin and mischief to society would be at least as great



When, therefore, a loss or damage accrues from such a misrepresentation, it is consonant with reason and natural justice, that the author of the mischief should be bound to repair it.

But the right of the calumniated individual to receive a compensation must, in all cases, obviously depend on the consideration, that by the fraud of another he has been deprived of that which he was otherwise justly entitled to enjoy; and the title to compensation must therefore cease, when the truth of the imputation is inconsistent with the right of enjoyment.

If a man commit profligate and wicked acts, upon what principle can he bind the rest of mankind to silence, or demand damages, should his real character be divulged? How can any right or interest be claimed

in the former case as the latter, although no one in particular could show, in the former, that he had sustained any absolute temporal loss, in consequence of the fraud. If, indeed, any temporal loss were to be occasioned by such a deceitful and fraudulent statement, then it would be both morally and politically expedient that the loss should be borne by the party who had occasioned it by his wrongful and immoral act.

This plain and obvious principle is fully recognised by the law of England, as indeed it was by the civil law, in a variety of instances. Thus, if A. were fraudulently to induce B. to give credit to C., by representing C. to be a person of wealth and credit, though A. knew him to be insolvent, he would be responsible to B. for any loss which he might incur from having trusted to A.'s representation\*. And if one were to give a false and undeserved character of a servant for honesty, where he knew him to be a thief, the party imposed upon having sustained damage from the misrepresentation, would, no

\* On grounds of extrinsic policy, such an action is now confined by the provision of the late act, to cases where the fraudulent representation is in writing.

in a false character, founded in fraud or hypocrisy, and subsisting only through ignorance? In short, in such a case, that fraud of which an innocent man would justly be entitled to complain, were his conduct or character to be misrepresented, attaches to the guilty complainant who would suppress the truth; to the hypocrite who would maintain the show of religion; to the profligate who would be esteemed moral; to the villain who assumes the character of an honest man, and not to him who plucks off the mask and exhibits the delinquent as he is (y).

Were the truth to be no defence, it would follow that a guilty man would be entitled to far greater damages, in respect of a true representation, than an innocent man could claim, in respect of a false one; the

doubt, be entitled to compensation from the author of the deceit. The great principle is, that where temporal *loss* is occasioned by *fraud*, reparation ought to follow; to this extent the moral and municipal law concur. Compensation to an individual, in respect of damage occasioned by a false representation of his character or conduct, is one class of cases which fall within this great principle, and in this, as well as all others, it is the *fraud* or *dolus* which gives birth to the right.

If A. were to inquire of B. as to the credit and solvency of C., B. would be guilty of an immoral and fraudulent act, as well in recommending C. for his honesty and wealth, when he knew him to be dishonest and insolvent, as in wilfully misrepresenting him to be dishonest and insolvent, when he knew the contrary to be true. Justice requires that reparation, in the one case, should be made to the *deceived*, in the other, to the *slandered* party.

(y) Cum autem duobus modis id est aut vi aut fraude fiat injuria, fraus quasi vulpeculæ vis Leonis videtur, utrumque homine alienissimum sed fraus odio digna majore. Totius autem injustitiæ nulla capitalior est quam eorum qui cum maximè fallunt id agunt ut viri boni esse videantur. Cic. de off. l. 1.

probability of conviction and of punishment would be far greater in the former than in the latter case.

Again, in point of natural justice, it is an understood condition, in all the various dealings and intercourse of society, that every one is what he appears to be, in all cases where exterior appearance can be supposed to have any influence in such dealings; and, therefore, whenever an advantage is obtained by virtue of a false appearance, that advantage having been gained by a species of moral fraud, cannot be the subject of right.

In the next place, how does the question stand upon grounds of public policy and convenience? If an individual has a right to protection against calumnious and injurious misrepresentations, is it not, on the other hand, conducive, if not essential, to the welfare of the community, that the characters of individuals should be truly estimated? If it be an offence against an individual to degrade him from his place and condition in society by wilful misrepresentation, is it not also an offence against society to raise an unworthy member advantages and honours which he did not deserve, either by false commendation or peremptory injunctions to silence.

It has already been observed, that a state of society is one of mutual confidence, in which each must trust others for the effectual discharge of every duty of civilized life. It is obvious, that where individuals have an interest in being truly represented, in order to enjoy a degree of confidence and esteem proportioned to their merits, the public have a mutual and correlative interest in truly knowing where trust may be safely and beneficially reposed.

It is plain, that members of the same community have an interest in mutually knowing the characters of those with whom they are to associate, for all the various purposes and relations of civilised life. The common imperfections of our nature, and the want of opportunity, to a great extent prevent the mass of mankind from acquiring a just knowledge of the characters of each other by every man's own observation and judgment; and the difficulty is further increased, by the consideration that the most dishonest and worthless members of society, at the same time, use the greatest exertions to preserve a fair exterior.

What greater encouragement, on the other hand, could be afforded to the exercise of every evil propensity, than that the actions of the wicked should be veiled in darkness, and that the good and the bad should mix in society, without the possibility of discrimination, that the apprehension of disgrace should cease to operate as an incentive to good conduct, and that the honest and virtuous part of society should no longer be put on their guard against the practices of the fraudulent and the depraved?

Let it, for a moment, be considered what would be the moral consequences of a general prohibition to publish the truth. There is, perhaps, no other feeling so strong, so universal, and so influential, as it were, on the actions of mankind, as the love of reputation. That laws, without morals, are vain and unprofitable, is an ancient position, which has been amply confirmed by the experience of every age and every country; that mere abstract moral, or even religious principles, unassisted by the dread of censure, would be insufficient motives

to good conduct in respect of the moral but undefined duties of social life is equally certain.

What are the great practical restraints which tend to the observance of legal and moral duties in a state of society? Within the narrow sphere of the municipal law, men may be deterred negatively from doing evil, it may be, in some few instances, compelled to do positive good, by the apprehension of penal consequences, sufficiently certain and severe to enforce obedience.

Religious and moral principles, on the other hand, though universal as rules of conduct, want the aid of temporal and immediate inducements to their observance. There is, in fact, a large portion of mankind, which, beyond the mere limits of absolute and peremptory laws, scarcely owns any other restraint than the fear of public censure and its *consequences*. But the love of fame, reputation, and character, is a motive of human conduct as powerful as it is universal, extending to every action which can be the occasion of praise or of blame, to all ranks and conditions,—who is free from its mighty influence (\*)?

Its operation is co-extensive with the moral law, whilst its inducements are of a present and powerful nature; on the one hand, promising temporal prosperity; on the other, threatening destitution, disgrace, and ruin.

To reject the moral aid arising from a feeling so universal and so strong, that it may well seem to have been conferred in order to adapt us to a state of society,

(\*) Quid philosophi nostri? nonne in his libris ipsis quos scribunt de contemnendâ gloriâ sua nomina inscribunt?

would be no better than an extravagant and irreparable waste of moral power, which might have been most usefully and beneficially applied to public advantage.

It were, however, to regard the operation of this great principle, in a very limited and confined view, were its influence to be considered merely in reference to the immoral and unprincipled; the policy is well warranted by experience, which subjects even the best and most enlightened of mankind to its powerful control.

The fear of censure may, in effect, be regarded as a moral force, which operates strongly, constantly, and uniformly to the public good, in opposition to base and unworthy motives; the best are not above (*a*), and even the very worst are scarcely below, its salutary influence.

To prohibit all communications concerning those actions of mankind which deserve censure, would be to make every bad man pass current for a good one, to provide a mask, under which every profligate and designing hypocrite might practise with security on the innocent and the unwary, it would be to repeal one of the great moral penalties against vice, the reprobation of the just, and consequent exclusion from their society; it would be to offer the highest possible premium for the encouragement of hypocrisy, to efface, as far as possible, all exterior distinctions between vice and virtue, and to mix and confound together the virtuous and the vicious to the common detriment of all (*b*).

(*a*) *Negligere quid de se quisque sentiat non solum arrogantis est sed etiam omnino dissoluti. Cic. de Off. 1.*

(*b*) It may further be observed, although it seems to be unnecessary

Another objection to the admitting the action for damages, where the communication is true, must be confined to those cases where the municipal law annexes any legal quality or efficacy to character, as the law of England does, where it admits evidence of good character, as tending to diminish the probability of guilt on a trial for a crime. It would be, in the highest degree, inconsistent and absurd, that the law should, in the first place, secure to every man a good character, whether he really deserved it or not, and should, in the next place, make that good character to operate as evidence of his innocence. In strictness, indeed, general reputation, as to character in society, would cease to exist, as soon as mankind were enjoined to observe perpetual silence, as to all which any member of that society had done amiss.

Cases of hardship may still be urged where no pub-

to dwell on the subject, that if a remedy in damages were to be awarded where the imputation is true, part would be given in respect of the plaintiff's own delinquency; for the truth of the fact, as well as the mere publication of it, have concurred in effecting the privation, and thus the complainant would be allowed to make gain of his own wrong. It is plain, also, that damages ought not to be given commensurate with the privation, for that was the proper consequence of the plaintiff's misconduct, and might have followed, though the fact had not been disclosed by the defendant; it ought, in justice, to be proportioned to the probability that the wrong doer would otherwise have enjoyed impunity. If A. were to commit a crime, and B. were to publish the fact, in consequence of which A. suffered loss and imprisonment, it would manifestly be unjust that B. should make full compensation to A. for that consequence, where a great probability existed that the same consequences would have followed from inquiry and detection in the ordinary course of justice.

lic benefit can arise from exposure, and where the suffering party is deprived of advantages which he might legally have enjoyed. For instance, where a delinquent has, by many years of penitence and good conduct, retrieved his character in society, to give a wanton, unnecessary, and renewed publicity to the circumstances of his offence, whilst it would overwhelm him with disgrace and ruin, might be productive of no real benefit to the public. And it may be urged, that the affording a possibility to those who have acted criminally, of retrieving their errors, and reinstating themselves in society by a course of good conduct, is to hold out a temptation favourable to the interests of morality. To a certain extent, and in a moral point of view, such observations are well founded; they afford, however, too uncertain and indefinite a foundation even for a particular and limited exception to a general rule, still less do they warrant a total rejection of that rule. How could such an exception be limited and defined? How many years of abstinence from crime, or even of positive good conduct, shall be sufficient to purify the tainted reputation of a criminal? At what period shall the law ordain that his misconduct, though not forgotten, shall no longer be mentioned, and ever after enjoin perpetual silence, under the penalty of an action for damages, to which truth shall afford no answer? Must not the period be proportioned to the nature and heinousness of the offence? Were such a limitation practicable, would not many a villain derive a sanction and protection from the law, though his vices were latent, not eradicated, and would not numerous opportunities of doing harm be afforded by imposing silence, which



would have been excluded by exposure. It is in all cases dangerous, frequently fallacious, to draw general conclusions from cases of individual hardship; in the present, it may well be questioned, whether, even in the particular instances adduced as examples, the community would derive no benefit from publicity, and whether a delinquent, under any circumstances, or at any time, has, in point of moral justice, a claim to be placed in the same situation, as to character, with those who have never offended.

It may, perhaps, be objected, that several of the arguments which have been thus used in support of the general position, that the publication of truth can in no case warrant an action for damages, assume that the complainant is in law or morals a *delinquent*, but that it frequently happens that a man's interests may be seriously affected, and his comforts and happiness greatly diminished by the publication of that which is true, but which is not imputable to him as a fault. This may readily be admitted, and it may be added, that a man sins grievously against morality, who, for the purpose of creating misery, publishes, concerning another, even that which is true; but it is to be recollected, that the question at present is not as to the moral, or even legal delinquency of one who publishes the truth, with a malicious design to create mischief, but whether the party, concerning whom nothing more than the truth is published, has such a right to privacy and concealment, as shall, even in point of reason and natural justice, entitle him to a compensation in damages from one who publishes the fact. Now, it may be observed, in addition to any arguments derived from considerations of

external policy, and regarding the question merely in reference to the right to civil remuneration, that if any injury or inconvenience accrue from publicity, in such a case, it must consist either in a mere injury and annoyance to the feelings of the complainant, from a sense of wounded delicacy, or in the intercepting and preventing some collateral benefit, which, but for the publication of the fact, would have accrued to the party whom it concerns. In the first place, a mere injury to the imagination or feelings, however malicious it may be in its origin, or painful in its consequences, is not properly the subject of a remedy by an action for damages; such offences being unconnected with any substantive right, are incapable of pecuniary admeasurement (c) and redress; they admit of no exact definition, and, therefore, to extend a remedy to such injuries generally, would be productive of great uncertainty and inconvenience, and open far too wide a field for litigation (d). In the next place, it seems to be clear, that a party who acquires an advantage by concealing the truth, which he could not have attained to had he divulged it, so far is guilty of fraud in the concealment,

(c) To such an extent is this principle carried, by the law of England, that most offensive, provoking, and insulting charges may be made *orally*, which are not the subject of an *action*, even though they are absolutely *false*. To charge a man with mere immoral conduct, however gross, would not be *actionable* in the absence of special damage, though the imputation were *false*, as well as *maliciously* made, see above, xxxi, note (a).

(d) See above, p. xxviii.

that he cannot, upon any principle, claim a right to acquire that benefit, and, therefore, cannot complain that he is injured by a publication of the truth.

By way of illustration, let it be supposed that a banker, being reduced to the brink of bankruptcy by unavoidable misfortunes, a friend, in ignorance of his circumstances, offers to deposit in his hands a large sum of money, but that the friend is prevented from doing so, in consequence of a report from some third person that the banker is insolvent. Ought the latter to recover damages? What has he lost but an opportunity of committing a gross deception, by receiving the money under a fraudulent concealment of his circumstances; if he could not honestly have availed himself of the other's ignorance of the real state of his affairs, it is obvious, that he has not sustained any moral, still less any legal injury from the disclosure.

Again, suppose that one who laboured under a latent and personal defect, or who was subject to some hereditary malady or disease, was prevented from forming an advantageous marriage by the disclosure of the secret by a third person, though a publication of the truth might be most offensive to the feelings, yet could it be said that any advantage had been lost to which the complainant was morally or conscientiously entitled? Once more, if a patron were to offer preferment to a party, under the erroneous supposition that he was a relation, when, in fact, the party to whom the offer was made well knew that he was no relation, and that the offer resulted from mistake, would it not be dishonourable and immoral to avail himself of an intended kindness, which was founded in mere error?

In these and all similar cases, where the advantage could not have been obtained, but through the medium of fraud, morally speaking, it seems to be obvious that no interest exists which can be noticed even as a moral, still less as a legal right. To recognize such rights, would as little consist with the principles of morality as of political expediency, for the natural and obvious effect would be to lend a legal sanction and encouragement to the commission of fraud, by rendering the practice more easy, and by affording a premium to the party who attempted it, even in case of failure (*d*).

Finally, to make the truth operate merely as a qualified defence, never singly, but occasionally, in conjunction with other circumstances, were the practice even more consistent with the principles of natural justice than it seems to be, would be productive of great inconvenience (*e*). Happily, the ancient and undeviating

(*d*) In one instance, at least, the presumption of solvency, on the part of a purchaser, as the tacit condition of the contract, is recognised by the law of England. Every man (according to Lord Kenyon,) who contracts to supply another with goods, acts on the presumption, that that other is in a condition to pay for them ; and, therefore, when the condition of the consignee is altered at the time of delivery, and he is no longer capable of performing his part of the contract, honesty and good faith require that the contract should be rescinded ; and on this footing that learned judge placed the doctrine as to the right of seizing goods sold to a bankrupt or insolvent, when the vendor is able to do so whilst they are in transitu, before they have actually come into the possession of the purchaser.

(*e*) Mr. Borthwick, in his late excellent work on the Law of Libel in Scotland, with a very natural bias in favour of the laws of his own country, combats the position, that the truth ought to be an absolute bar to the claim for damages, with great force and great ability. He urges, that the reason given by Sir W. Blackstone, for refusing the

rule of the English law on this point has protected us from an actual and intimate knowledge of difficulties,

action for damages, where the imputation is true, viz. that the public are benefited by this disclosure, is inconsistent with the doctrine of the law of England, that a libel, though true, is punishable criminally. Now, certainly, if the reason for denying the civil remedy, in such a case, really were that of the civil law, that is, the public benefit resulting from the publication, there would, no doubt, be ground for charging the law of England with inconsistency in this respect; that, however, is not the reason, or, at all events, not the principal reason on which the law of England proceeds. The principles on which the law of England, in such cases, denies the right to damages, are the plain and obvious ones, that the *fraud or deceit*, which is of the essence of the wrong, is wanting; that no man can have a right to recover damages in respect of the publication of his own misconduct, and perhaps even more generally, that no one can have a legal right or interest in the suppression of truth. The negation, therefore, of the civil remedy is perfectly consistent with the infliction of punishment, the public may be injured where the individual has no claim to damages. If a man were to wound an outlaw, the latter could claim no damages; and yet the former would be worthy of punishment, for the wanton outrage he had committed against the public peace. Mr. Borthwick further observes, that the truth of the charge is no just gauge of the injury done by the libel or slander, that though the tradesman is proved to be a bankrupt, or the physician a quack, great injury may have been done to the tradesman or physician, by the information being more widely circulated than it otherwise would have been. The answer is, that the denial of the remedy by the law of England is not founded upon the supposition, that no harm or loss has accrued from the publication of the truth, but on the injustice, or, at least, the impolicy of permitting the party, who has sustained the loss, of recouping it in damages from one who has spoken merely the truth. The law, in such cases, admitting the *damnum* or loss to have been sustained, denies the existence of the *injuria*, the violation of any right which the plaintiff had.

the reality of which may be collected from the experience of others.

Again, Mr. Borthwick argues, that as it is by the indiscretion, or, at least, by the malice of the defender, that his liability is to be judged of, although the truth of the charge were proved, and if no *other circumstance* but the truth were required to complete the justification of the defender, he might be absolved from the action, though the greatest degree of both culpability and malice had actuated his conduct. This objection, on the score of inconsistency, obviously assumes, that the law of England, as of Rome, and, as it seems, of Scotland, regards the *animus infamandi*, or *mens rea*, as of the essence of the offence, and admits of two answers, 1st, the law of England, with a view to the civil remedy, principally regards the loss or damage to the person or estate, and not the contumely of the act. See Wood's Inst. 17, and *supra*, xxxi. note (a); *infra*. vol. 1, p. 10, where the act is wilful and noxious, malice is but a mere legal inference from the act, in the absence of facts which constitute an absolute or qualified justification, and, in many instances, an absolute justification arises from the mere facts, and malice, however intense, creates no right of action.

But, 2ndly, even were the malicious or contumelious intention of the essence of the wrong, there would be no inconsistency in repelling the action, under circumstances which, for reasons of extrinsic policy, warranted the exclusion. There cannot be a stronger instance to prove this, or one which ought to weigh more with those who profess to adopt the civil law, than that afforded by the civil law itself, which, though it regarded the contumelious intention, as the very gist and essence of the action, civil, as well as criminal, seems to have considered the truth of the imputation to be in itself, independently of the question of intention, a decisive bar.

In illustration of his argument, Mr. Borthwick cites the following decision of the Parliament of Toulouse, mentioned in the *Causés Célèbres*, vol. 6; *Histoire du Procès des Sieurs Saurin & Rousseau*.

“Le parlement de Toulouse a décidé ainsi—une fille qui auroit mis clandestinement au jour un fruit de l'amour à qui elle auroit conservé la vie, pourroit se plaindre en justice du médisant qui reveleroit

It may justly be observed, that the principle of moral justification is applicable only where the motive of com-

son deshonneur, parceque la défamation la depouille de l'honneur dont elle jouissoit par un *faux titre*, mais *qui ne faisoit tort à personne*, sa possession etoit legitime avec ce titre coloré. Le *Fore interne* s'accorde encore ici avec *le fore externe*.'

A médisant, employed professionally and confidentially, reveals the dishonour of a young unmarried woman, whom he has secretly delivered of the fruit of an illicit amour, the court decrees, that she is entitled to recover damages for the mere defamation, as contradistinguished from a wrong done by the breach of promise or professional confidence\*, for, if the decision were founded on the latter ground, it would resolve itself into a mere question of contract or of professional duty, and would be too much limited in its circumstances, to be valuable as an illustration of a general principle. For, though the law were to award a remedy in such a case, in respect of the breach of an express or implied promise, or in respect of the violation of a legal and professional duty, it would still decide nothing on the great and general question, as to the right to damages, in respect of the promulgation of true but defamatory matters.

What, then, is the force of the reasons alleged for the decision? That the complainant being in possession of a character to which she has no title, the law ought to protect that title, *because* the possession of it injures no one. But may not undeserved character be injurious to others, may it not enable a profligate woman to form connections, even that of marriage itself, and thus to practise a cruel deceit under the mask of virtue; may she not, under the same false colour, be enabled to contaminate the principles of others of her own sex; is no injury done in causing a woman of abandoned principles to be received and accepted into the bosom of society, as a person of unblemished reputation? But even admitting that the character injured no one, does

\* By the Code penal of France, art. 358, physicians, surgeons, midwives, &c. who reveal secrets confided to them in their respective capacities, (except in cases where the law compels them to the contrary,) are liable to imprisonment.

munication is a benevolent and sincere one, and that to publish even the truth, with a malicious intention to

it follow that the law ought to protect it; would it not be impolitic to give protection and encouragement to laxity of moral conduct; would not the affording it be, *pro tanto*, to remove a great and efficacious restraint on immorality, the dread of censure and exposure. Again, how can a *false* title to character give a *real* title to damages for the loss of that character? Let us suppose that one of the most injurious consequences that can result from such defamation has actually been occasioned by the publication, viz. that the party has lost the benefit of an advantageous marriage; yet what legal ground of complaint can there be in losing that which could not have been gained but by a base and fraudulent concealment. No laws, either municipal or moral, could contemplate any right or interest in a contract made under such circumstances, the complainant would therefore have lost nothing which the law could recognise as the object of legal protection. She would, in effect, have lost nothing but the opportunity of doing an injury by means of a fraudulent concealment of the truth. It is further observed, that the decision is in consonance with the feelings (*le fore interne*) of mankind. The feelings of individuals constitute, however, but a very indifferent forum for the decision of cases where the judgment is liable to be warped by the particular circumstances, in opposition to general rules, which, in their constant and uniform application, conduce to public happiness. The conduct of a professional man, who betrays such a secret, is, no doubt, most dishonourable, unprofessional, and immoral, such as is calculated to excite a sense of the highest indignation; but does it therefore follow, that it would be wise to award, on that account, a compensation in damages, and to establish a general precedent on the particular hardship, without any consideration of the general principles on which the claim to damages ought to be founded? Still less would it follow that such a remedy ought to be given against one who had published the fact, without being guilty of any breach of professional confidence.

Besides, it is easy to see that the moral sense of mankind would afford no general rule for the exclusion of truth, as a defence, but ra-



create misery, is, in *foro conscientiæ*, an immoral act; this is true, but this is one of the numerous cases where

ther the contrary. Let it be supposed, for instance, that the complainant had been guilty, not as in the case cited, of a single deviation from the paths of virtue, but that she had led a life of vice and depravity in a distant country, would not the moral sense of society condemn, rather than approve, the law which allowed her to recover damages against one who had merely put society on their guard, by publishing her true character? Would not men question the wisdom of a law which enabled one who had led an impure and profligate life, to recover damages for a reflection on her chastity? Is any man's mind so constituted as to think it just or reasonable that a murderer should recover damages from one who had published his guilt even maliciously?

It follows, then, that if the mere moral sense does not always approve such a defence, it is, at all events, far from sanctioning the general exclusion. Where then is the line to be drawn? Mr. Borthwick concludes his argument with these observations,—“If a person is not placed in one of the situations which are called privileged, or unless he can show that what he said was uttered, for the purpose of *promoting conviviality or amusement, or in consequence of passion, inebriety, or such temporary excitement*; and yet shall be exculpated in every case from an action of damages, for having defamed an individual, merely by proving that his expressions were true, there seems, for the reasons above assigned, not only to be an *inconsistency* in the application of the legal reasoning that supports such a doctrine, but the practical consequence would seem to lead to no other alternative than to pass with impunity every act of cold-blooded calumny, provided only that it be grounded on a true statement, however prejudicial that statement might be to the sufferer, and however unprovoked, officious, and malevolent it might be on the part of its author.”

Upon these latter comments, it may suffice to remark, that the supposed *inconsistency* of the doctrine of the English law on this subject having been already observed on, it would be superfluous to reiterate any observations on that subject. But it is to be most emphatically observed, that the practical consequence alleged to result from the doc-

it is questionable, whether legal can be made to coincide with moral boundaries. It is frequently difficult to

trine of the law of England, that truth shall be a bar to the action for damages, by no means follows. It is to be recollected, that the criminal and civil wrongs are not mixed and complicated with each other by the law of England, as they are both by the civil law and the law of Scotland, and that, though the law of England, with cool, cautious, and steady adherence to a general principle, universally repels the action for damages, where the imputation is true; yet that the same law visits every malicious libeller with penal censures, without regard to the truth or falsity of the libel. It may, indeed, readily be admitted, that a man may indulge a wicked and malicious spirit, in publishing the truth, without incurring any liability to damages, according to the law of England; but what is the sum and substance of this objection? simply this, that the law does not award damages to be recovered in respect of an imputation truly made, merely because it has been maliciously and immorally made. This ground of complaint against the law, taken in the abstract, avails nothing; it is impossible that the municipal should be co-extensive with the moral law, so as to subject the author of every malicious and immoral act, to a civil action for damages. The very extent to which such an objection might be pushed in effect refutes it; if the suffering of a guilty party from publicity and cold-blooded malice on the part of the publisher, give a claim to compensation, it ought to be given even where a malicious party prosecutes and convicts the offender according to law, or publishes, that such a conviction has actually taken place, for many cases might be put where such a proceeding would be harsh, vindictive, and oppressive. Neither is there any inconsistency in the application of the general principle of English law to the particular case, for the ground of compensation is *loss* or *damage*, in respect of a fraudulent or negligent misrepresentation. The question then is, whether that general principle be a correct one, and whether the truth of the fact ought to repel an action for defamation, without regard to the malice of the publisher, and this, as has been seen, is an important question, to be determined, not by a few instances of hardship which may fall on penitent offenders, but on general

ascertain the true motive of an act which, in its nature, may be attributable either to a good or bad motive; in

considerations of public policy. Those considerations seem to weigh strongly in favour of making truth an absolute bar to compensation, both because the falsity of the charge is the true principle of civil liability, and because it would be 'impolitic too nicely' to scrutinize the motives of those who had exposed delinquents, and impracticable to lay down definite rules, which would admit such a remedy in cases of hardship and malice, without, at the same time, affording protection and encouragement to those guilty of the most heinous and detestable crimes. If this be an error in our national jurisprudence, it is one which, to a great, though not perhaps the same extent, is attributable to the laws of Athens, Rome, and modern France.

Assuming that the policy of the English law, in this respect, is doubtful; what is the alternative proposition? not to reject the truth as immaterial to the defence, that is not contended for, but that the truth shall be available with certain other circumstances, which ingredients shall, in their union, supply a full and complete justification. Now, the very instance of Scotland herself, whose laws on this subject Mr. Borthwick has with great learning and great ability both expounded and defended, affords a very strong illustration of the difficulty of establishing precise and definite rules on such principles. Mr. Borthwick, with great candour, observes, that "lawyers of the greatest eminence have differed, and may continue to differ, from each other on this subject, some of whom have thought that our law (i. e. of Scotland) has not yet arrived at that degree of maturity which can put us in possession of a general rule. Future decisions will remove this difficulty." Certainly, the decisions of the Scotch courts, which Mr. Borthwick has collected, conflict too much to yield any certain and definite rule; and it is observable, that in two of them, viz. *Scott v. Baillie*, Borth. 268. and *Fife v. Fife*, ib. 272, the plea of the truth was allowed to constitute a full defence. In the former case, the defender, Mrs. Baillie, had publicly, at an assembly, asserted, that the pursuer had for a long time been a woman of gallantry. Mr. Borthwick observes, that this case was afterwards disapproved of, in *Ross v. Mackerrell* (Borth. 349.): in that case

such a case, it may be far better policy at once to presume charitably in favour of innocency of intention, than

the president took occasion to say, that in the case of *Chalmers*, widow of *Scott v. Baillie*, no proof of the *veritas convicii* should have been allowed, *but that there was no general rule upon the subject*. In the case of *Fife v. Fife*, (Borth. 272,) Fife pursued one of her neighbours for damages, for saying that she kept a house of bad fame; the defender averred that it was true. A proof was allowed, and having proved the fact accordingly, the defendant was assolized. Mr. Borthwick observes, that in this case the proof of *veritas* was properly admitted, because it was a public duty, not a malicious act, to expose the pursuer. It would, however, be very difficult to establish any definite limit on the distinction between those offences which it was a public duty to expose, and, consequently, where the *veritas convicii* ought to be allowed, and those, in the exposure of which the public had no interest. Mr. Borthwick also suggests that, even admitting *Chalmers's* case to be an authority, as far as oral slander is concerned, yet it is not an authority in case of libel, which differs essentially from oral slander; and he refers to the law of England in support of this distinction, observing, that it was not until the middle of the last century permitted to a defendant to justify, in the case of written slander, (citing Lord Hardwick's dictum, in the *King v. Roberts*, Selwyn's N. P. 986.) The notion, however, that by the law of England a justification of the truth cannot be pleaded to a civil action for a libel has long been exploded, and not only so, but the soundness of the distinction of the law of England, in considering that to be actionable, when written, which would not have been so if merely spoken, has been questioned by some of the best English lawyers. And though that doctrine of English law is now too firmly established to be shaken, there can be no doubt that it is an anomaly which has arisen from adopting the civil law doctrine as to libels, according to which, personal indignity, insult, and contumely, are the proper foundation of the action, whilst, according to the ancient principles of English law, the loss or damage to the party grieved, either actual or presumed, is the real foundation of the civil remedy. Mr. Borthwick,

to open a field for litigation. The convenience is great, on the one hand, of laying down a precise and general

indeed, as has already been observed, very justly attributes much of the uncertainty which has prevailed on the subject of the *veritas convicii*, as well in England as in Scotland, to the conflicting and unsatisfactory opinions of the commentators of the Roman law. Borth. p. 244. Be this as it may, it is very difficult, on any certain principles, to admit the *veritas convicii* as an absolute bar to oral slander, and yet to reject it as an answer to a libel.

It may be proper to observe, in this place, that Mr. Borthwick, in the course of his concluding remarks, seems to have assumed (agreeably to the civil law, probably also to the law of Scotland,) that proof that a defendant uttered the defamatory matter complained of, for the purpose of promoting *conviviality or amusement*, or in consequence of *passion, inebriety*, or such temporary excitement, would, by the law of England, furnish a defence to the action for damages. The law of England, however, does not sanction such a doctrine, and on this, as well as on many other occasions, may well boast a superiority over that code which our ancestors so wisely refused to adopt. Upon what principles of reason or natural justice, or even of artificial policy, is a man to be excused from answering in damages, where he has knowingly and wilfully occasioned mischief to another, because he did it for his own amusement, or because he was drunk, or excited by passion. It is for the law to define the rights of individuals, but when defined, nothing can be more clear, in point of reason and natural justice, than that a remedy ought to be given in respect of every wilful invasion or aggression of those rights. Is it not plain, that when the right to reputation and character is once recognised by the law, every wilful redemption of a character ought to confer a title to damages, as well as in every other instance of the violation of a recognized legal right. What legal excuse or justification then can arise from the consideration, that a man, in depriving another of character, by casting the most odious imputations on him, did it because he was in jest, or was drunk? Though to himself it may be matter of jest, to the unfortunate object of merriment, the calumny may

rule; the practical inconvenience on the other, of affording protection to a malicious act is small, when the act,

be utter ruin; though uttered in joke, the charge may be reported and believed in earnest; and intoxication, so far from taking away the sting of the calumny, may, in some cases, according to a vulgar adage, even supply an inducement to belief. Finally, in support of the consistency of the superior merit of the law of Scotland, and of its consistency with the abstract principles of justice and equity, Mr. Borthwick refers to Mr. Fox's speech on the discussion, in the House of Commons, on the Libel Bill, May 20, 1791. Parliamentary History, vol. xxix. p. 575. That celebrated orator and statesman, in his speech on that occasion, admitted, that "there certainly were cases in which truth would not be a justification, but an aggravation. Suppose, for instance, a man had any personal defect or misfortune; any thing disagreeable about his body; or was unfortunate in any of his relations; and that any person went about exposing him on those accounts, for the purpose of malice; and that all those evils were, day after day, brought forward to make a man's life unhappy to himself, and tending to hold him out as the object of undeserved contempt and ridicule to the world, which was too apt to consider individuals as contemptible for their misfortunes, rather than odious for their crimes and vices; would any man tell him, that in cases of that sort, the truth was not rather an aggravation?" The justice of these observations is undeniable, the truth of facts, which impute no blame to a party, who may, nevertheless, be annoyed and irritated by the wanton publication of those facts, can afford no justification to the aggressor in a moral point of view. Truth, as well as falsehood, may be used as the instrument of malice; and, consequently, where the object is to restrain such contumelious reflections and abuse by penal censures, it would be absurd to make their truth a defence upon a criminal charge. It was in reference to penal restraints, that the observations cited by Mr. Borthwick were made by M. Fox, and upon this point the law of England agrees with that of Scotland. The controversy is upon the question, what effect ought to be attributed to the truth of the imputation, where the complainant demands a *compensation in damages*; here it cannot be said that the truth is an aggravation,

in its own general nature and effect, is beneficial. At all events, the effect of the objection is merely to deprive the author of the communication of his moral defence, and leaves the question upon considerations of general policy and convenience, just as it stood before.

In the next place, that some *communication* of the

it would be as contrary to the plainest principles of natural justice and policy, as it would be repugnant to the common sense and feelings of mankind, to say that a guilty man ought to recover larger damages for the mere assertion of his guilt, than an innocent man ought to do, in respect of unmerited obloquy, where the moral, as well as legal wrong, was enhanced and aggravated by base and deliberate falsehood. To the question, therefore, now under discussion, the observations alluded to in the debate on the Libel Bill, have no application.

A comparison of the law of England with that of Scotland, does not permit the advocate for the former to object to the latter, the repelling a defence founded on the truth of the libel, in the case of a criminal prosecution; but he may object that the *veritas consocii* ought to be received as a valid plea, in all cases where the complainant sues for damages, and that the law of Scotland, as well as the civil law, whence the rule is derived, acts on a faulty principle, in constituting not the damage to the party injured, but the contumelious intention of the calumniator, the main test for deciding on the relevancy of the remedial action; and certainly the law of Scotland deviates from the civil law, in not allowing the plea of the truth to avail as a defence, in cases where the civil law, on grounds of policy, admitted that defence. For the language of the Digest, on this point, seems to be too clear to admit of serious doubt as to its meaning. The rule and practice of the civil law, in admitting the truth to amount to a substantive justification in the remedial action, agrees, in the main, with the rule and practice of the law of England. And, perhaps, the very circumstance, that the same practical conclusion has been derived by the aid of different principles, might well be urged as a further argument in its favour.

noxious and calumnious matter to a third person, is essential to the injury, necessarily results from the very notion of *damage*, whether it be *actual* or *presumed*, though the extent and magnitude of the injury may depend greatly on the nature of the publication. A publication, by writing or printing, may, from its widely extended circulation and its permanency, be far more injurious than one which consists merely in oral discourse. A communication to one, or a few individuals, may be far less injurious than if the calumny were to be uttered publicly in the presence and hearing of many.

Again, an oral insult may be greatly aggravated, by the consideration that it was offered in a man's own house, in the presence of his family, or before a public assembly of friends or others whose respect he would be anxious to retain. As far, however, as the *claim to damages* is concerned, if there be an actual publication of the calumny to a third person, (for that is plainly essential to the notion of damage, actual or presumed,) such circumstances, whatever their effect may be, in enhancing the damage sustained, do not seem, in principle, to afford any material or essential test for ascertaining the title to some compensation. If *any damage* has actually resulted from a publication to a third person, other circumstances, constituting an aggravation of the wrong, cannot be material, otherwise than as they affect the question of damages; and if damage be presumed in law, and proof of actual damage be immaterial, still circumstances of extended publicity merely affect the question of degree, and not the presumption itself. If damage is to be ~~presumed from a~~



publication to many, some damage may also be presumed from a publication to a single individual, especially as that individual may afterwards publish the slander indefinitely. And, therefore, if the law on a presumption of a probable damage constitutes a particular class of communications substantively actionable, though no particular loss or damage can be proved, it is obvious that a communication to a third person is all that is essential, and that the mode and circumstances of communication do not in themselves supply any obvious and natural limits for defining the extent of civil liability (g).

(g) The civil law made a material distinction, not only between *oral* and *written* defamation, but even between an injury by *writing* and one by *pictures*. Thus Heineccius Lib. 47. tit. 10. in explaining the title in the Digest de Injuriis & Famosis Libellis, observes, “injuriam aliam esse verbalem si quis alteri convicium adversus bonos mores facit vel fieri curat, aliam realem quæ re et facto inferitur.—Ad priorem etiam, injuria scripturâ, ad posteriorem et per picturam illata refertur.” There seems, however, to be little either of principle or practical utility in this distinction of the civil law, which constitutes defamation by means of a *picture*, a real injury, whilst it regards a calumny in writing, though it convey precisely the same ideas, and is equally permanent in its nature, as a verbal one.

Some of the numerous commentators on the civil law have reasonably doubted the propriety of this distinction, whilst others have as strictly maintained it: the force of their arguments may be appreciated from the following example—Mathæus de Crim. tit. de Injuriis & Famosis Libellis, c. 1. s. 1.

Referenda huc et illa (Injuria) quæ fit monstrosâ et infami picturâ, nec rectè quidem picturam ad famosos Libellos transferunt tanquam muta imago non minus ac literæ loquatur; aut, ut auctor Rhetoricorum ad Herennium lib. iv. scripsit quod pictura tacitum poema sit: nam et ratione injuriam quæ manu telove fit, ad scriptum quoque

In the next place, do any and what limitations naturally arise from a consideration of the *motives* and *inten-*

*referre* posses, tanquam et vulnus loquatur et tubera capitis et vulnere obdueto cicatrix.

It must, however, in fairness be observed, that this passage, in which the learned writer so entirely confounds the means with the consequences of injury, is a very unfavourable specimen of his justly celebrated and most useful treatise. The Roman law not only recognized the distinction already mentioned between oral and written defamation, but also distinguished between various circumstances of oral slander. It was termed in some instances *convicium*, in others, *maledictum*.—See Dig. lib. 47. tit. 10. *Convicium* propriè est (says Matthew) cum in cœtu aliquid dicitur aut cum vociferatione pluribus vocibus in unum collatis quasi *convocium*: quod autem non in cœtu nec cum vociferatione fit *maledictum* tamen est *si fit adversus bonos mores civitatis*. d. l. 15. § *Convicium* et § *sive unus*. Quinimo etsi naturâ non sit contra bonos mores civitatis *locus* tamen et *modus* efficere possunt ut *convicium*. Ex. gr. Idoneum debitorem appellare non est *convicium*: sed facere id in publico et cum clamore. *Cedo fœnus*, redde fœnus, fœnus reddite. *Daturine estis fœnus actutum mihi*; *Date mihi fœnus*: *convicium* est.

This distinction between the mere *maledictum* and the *convicium*, was not, it must be admitted, unreasonable, especially with a view to the protection of the public peace, many expressions may be used in private, the noticing of which would be beneath the dignity of the law, as being too trifling and unimportant to require judicial cognizance, and yet the very same words spoken before a large assembly, might not only be likely to produce serious and injurious consequences to the individual, but also to provoke him to acts of personal violence. The distinction between the *convicium* and *maledictum*, is not recognized by the law of England.

In the case of *Jones v. Harne*, 2 Wils. 87. *Infra*. 24. Willes, C. J. observed, that if it were *res integra*, he should hold that the calling a man a rogue, or a woman a whore, in a public company, was actionable. Yet his mode of expression clearly showed that he considered

*tion* of the publisher; first, either in the abstract, or secondly, taking into consideration the *occasion* and

the law as established to the contrary. And it is not improbable that more would be lost than gained by the introducing a distinction which would be subject to great uncertainty. The doctrine of the Roman law, on this subject, was exceedingly lax and indefinite: every expression was *maledictum*, and the subject, as well of a criminal as a civil proceeding, which was "*adversus bonos mores civitatis*," a vague and uncertain definition, as the mass of comment which it has undergone sufficiently evinces. A host of interpreters, according to Matthæus, have asserted, that to affirm, even truly, that a man had but one eye, or was bald, or lame, fell within the scope of this expression. Again: to say nothing of the difficulty of deciding what number of persons or what circumstances should constitute the *catus*, or what loudness of tone the *vociferation*, the very example adduced is sufficient to shew the laxity and extent of the definition, when even the demanding of a just debt before many witnesses was to be deemed to be a contumelious injury and offence. So convinced was the commentator just cited, of the difficulty of deriving any certain rule from the Digest on this subject, that he concludes with the expression of his opinion, that in each case it must be left to the discretion of the judge whether he will interfere or not. *Hanc ob causam ego existimavêrim iudicis potius iudicio relinquendum esse ut ex re atque personâ statuât prætermittenda an animadvertenda hujusmodi sit contumelia.*

The law of England has recognized but one distinction as to the mode of communication, that is, between *mere oral* ones, and those effected by *writing*, printing, painting, or other visible signs. This distinction is, however, applied by the law of England in two instances of very great importance, the one in reference to civil, the other in respect of criminal, liability. In the first place, the circumstance of the calumny being conveyed in writing, print, &c. (in which case it is termed a libel) is made use of to constitute a very large and important class of substantive injuries, where the calumny is by legal definition and authority made actionable, though no actual damage can be shown.

*circumstances* of publishing? There are strong and powerful reasons for insisting on the general proposi-

So that although, in other instances, the law limits such actions as are maintainable without special damage to particular and defined predicaments in reference to the nature and quality of the communication, and the probability that it will produce damage, though none can be expressly proved; as where it imputes the commission of a crime, or immediately affects the complainant, in his means of livelihood, yet in the particular instance of *written slander* the law abandons that principle, and by an arbitrary distinction, founded on the mere mode of communication, makes that to be actionable, without special damage, when it is written or printed, which would not have been deemed actionable had it been merely spoken. As for instance, to charge a man by word of mouth, with want of veracity, or with dissolute conduct, would not, unless some special loss were the consequence, support a claim to damages; yet if the same imputation were to be published in writing, the action for damages would be maintainable. This, however, must be regarded as an absolute peremptory rule, not founded on any obvious reason or principle. If damage is to be presumed from publishing such a charge in writing, why is not some damage also to be presumed from publishing the fact orally? The extent of publicity, and quantity of damage to be presumed in the one case, rather than the other, is obviously casual and uncertain, and rather affects the measure and quantum of damages than any principle of civil liability.

Another, and that a most important application of this distinction between oral and written publications, is made by the law of England in the criminal branch of the subject. In all cases of mere personal calumny, the distinction between a written and an oral charge is made the material boundary between guilt and innocence. Whatever tends to lower and degrade a man's moral character in society, or to expose him to contempt and ridicule, is criminal, if it be published in writing, although the very same matter, if spoken only, would have constituted no offence. Here again the boundary is not founded on any intrinsic principle of criminal liability; for one great object of the law in prohibiting the publication of libels of this description, is to exclude provocations which tend immediately to a breach of the peace, and it is obvious that oral abuse,

tion, that if any man publish concerning another that which in legal contemplation is injurious and actionable,

when uttered in the presence of the party defamed and in the hearing of others, is oftentimes much more strongly provocative than the same calumny would be, though written, if published in his absence. But though such considerations clearly prove that the law of England, if the principles of intrinsic expediency were alone to be regarded, would be inconsistent in establishing a limit which would so frequently admit the very mischief to be guarded against, it is to be recollected that the expediency of a law in reference to the particular mischief intended to be excluded, is a very different question from its general expediency, in reference to extrinsic circumstances, which oftentimes greatly limit and restrain the generality of the rule which would prevail were the restraining of the particular mischief, the only object to be attained.

It is expedient, no doubt, to restrain men from using calumnious and provoking expressions concerning others, but it would, on the other hand, be highly inexpedient and mischievous to subject the utterer of every expression which might possibly provoke offence and retaliation, and ultimately violence, to a penal prosecution: it would be attended with fearful evils, legal as well as moral, if men's mouths were to be closed as to all communications in which the character or reputation of others might possibly be involved. What then is to be done if the evil cannot be wholly excluded, and cannot be tolerated without some restraints; a line must somewhere be drawn, which, whilst it partially restrains, at the same time partially admits, the evil. In this, as in many other instances, good and evil are so closely and intimately blended, or rather perhaps, more properly speaking, opposite mischiefs so conflict and contend together, that it is impossible wholly to exclude either without increasing the whole quantity. In such cases the important problem is to discover the precise rule, which, though it does not entirely exclude either of the opposite and conflicting inconveniencies, yet admits only the minimum of evil. It is upon these plain and simple grounds that the law of England is founded, which, whilst it prohibits the publication and punishes the publisher of written slander, takes no cognizance of mere oral calumny, and whilst it

no limitation, exemption, or privilege, can be founded on the motive and intention of the publisher considered independently and abstractedly from some occasion defined and recognised by the law, and supplied by the circumstances. It is an obvious rule of natural justice, that wherever a man uses noxious and injurious means, he must be presumed to have contemplated and intended the injurious but natural consequence of using such means (*h*).

The publisher of a communication concerning another, which is in itself noxious and injurious, must stand in one or other of these different predicaments as to intention and motive. He may act either from a motive of pure malignity, as out of revenge for some supposed affront; or, secondly, from an honest and benevolent motive, as if a father were to warn a son that one with whom the latter was about to contract a partnership was insolvent, or a man of dishonest principles; or, thirdly, being merely indifferent as to consequences, he may be actuated by some collateral motive, with a view to applause or gain, or may act carelessly and negligently, without any fixed or determinate motive whatsoever. As where one, for the sake of shewing his wit or talent for sarcasm, in-

restrains by penal means all deliberate attempts to destroy character and reputation by written defamation, leaves mankind at full liberty to communicate on the subject of character and reputation, without the fear or apprehension of penal visitation.

(*h*) Si verba quædam prolata sint ambigua duplicem admittentia significationem, in bonam partem in dubio facienda eorum interpretatio, quoties enim alia potest capi conjectura pro delicto præsumendum non est. Sin tales fuerint prolati sermones qui per se et propriâ significatione contumeliam inferunt injuriandi animus adfuisse creditur.—Voet. Com. tit. de Injur. p. 1023.

dulges it at the expense of another's reputation, not because he really feels any inclination to do that other an injury, nor because he is actuated by any personal feeling of hatred or animosity, but merely to entertain others and shew himself off to advantage.

But it is plain that no one of these predicaments can, without reference to the legal occasion and circumstances of the act, afford any certain boundaries of responsibility. Be the motive ever so malicious, there may be and are cases where it is essential, on grounds of legal policy, to *exclude responsibility*. Again, though the intention of the party be ever so pure and unexceptionable, and consequently, though he be entitled to the utmost indulgence which is consistent with a due regard to the interests and characters of others, it may nevertheless be necessary to restrain the nature and mode of communication by such limits as may consist with general convenience; for it is pretty obvious that a well intentioned man may use very exceptionable and very injurious means for carrying his intentions into effect; and, consequently, to make a mere abstract intention to do good, the criterion of civil, or even of criminal responsibility, would be a test far too uncertain and precarious for practical purposes; it is essential, therefore, that the law itself should define, in reference to the occasion, to what extent the acting on such intentions should be privileged. Where such boundaries have been defined and appointed by the law, the wilful transgression of them cannot be justified in foro conscientiæ, still less in foro humano; for no man has a right, even morally speaking, to act on his own opinion in derogation of the legal right of another, and in opposition to the municipal law of the

country. To allow him to do so, because in his own opinion his act was meritorious and expedient, would, in effect, be to permit every man to act on his own judgment, in opposition to the law, and that not only in the particular instance but in all cases, which, in effect, would be to substitute every man's own vague notion of what is right and expedient, for the certain rules established by the supreme power of the state.

It follows, therefore, that in the case of intellectual injuries to character and reputation, as well as in those of forcible ones to the person, it is for the law to define the particular occasion and circumstances which will operate by way of justification and excuse in cases where a wilful communication to the detriment of another would otherwise have subjected the author to make compensation in damages. And consequently it follows, that the real motive and intention of the author or publisher of a communication which is illegal, either intrinsically or in respect of its consequences, in the absence of such an occasion and such circumstances as amount in point of law to an absolute, or at least a qualified excuse, are wholly immaterial as a test of civil liability. And, consequently, that although the offence of calumny be defined in terms which include a corrupt or malicious intention, the *consilium* or *animus infamandi*, yet that in the absence of such an excuse for the publication of noxious matter, which the law recognises, such an intention is necessarily to be inferred or presumed from the act itself (i).

(i) And, therefore, although according to the Roman law, the *mens rea* or *animus infamandi* was regarded to a much greater extent than the law of England permits; yet was the illegal intent regarded



4thly. The *occasion* and *circumstances* of the communication.

as a matter of inference from the use of contumelious expressions, *supra*. lxxv. note (h).

It is not improbable that in the earlier stages of the law and before the limits of privileged communication had been defined by reference to the occasion and circumstances of the act, the *mere malicious intention* of the agent would be regarded as the principal test of civil responsibility. Experience would show the insufficiency of such a criterion, and limits would gradually be introduced, defined by reference to the occasion and circumstances of the act, independently of the actual intention with which the act was done. It is probable, however, that the former doctrine and language of the law, according to which malice is an essential to responsibility, would still be retained, but that effect would be given to the newly introduced limits, by recognising the distinction between *malice in law*, which is nothing more than a mere legal inference resulting from the wilful doing of an unlawful act without legal excuse and *malice in fact*, which depends on the actual intention.

And thus, in legal and technical language, malice would be regarded as essential to the action, and as the test of liability, although it was *actually* so in one class of cases only, that is, where the occasion supplied a qualified excuse or justification, dependent on the absence of actual malice; legal responsibility, in all other cases, being dependent on the existence or non-existence of an occasion which supplied an absolute bar, and being wholly independent of the question of intention.

There is a distinction in the law of Scotland, as to *intention*, between cases where the damage is awarded merely in *solatium*, and where they are given to repair a *patrimonial loss*; that is, according to the law of England, between cases where the communication is intrinsically actionable and those where *actual damage* must be found; in the former case where the proceeding is in *solatium*, it must be founded upon *dolus malus*; but in the case of *patrimonial loss*, *culpa levissima* is sufficient.—*Craig v. Hunter*, June 29, 1809.

Actual damages are due, though occasioned by an *error*.—per *Ld. Gillies*. Borth. 194.

The term “malice,” as used by the law of England, as essential to liability, includes the *culpa* as well as the *dolus* of the civil law.

It is then to be considered, whether assuming noxious and injurious matter to have been published, the civil remedy ought to be restrained in respect of the occasion and circumstances of the act, either with or without reference to the *motive* and *intention* of the publisher.

In the first place, that it is on grounds of expediency, necessary, in numerous instances, to define and restrain the right to damages by limitations, founded on the occasion and circumstances of the publication, admits of no doubt.

The necessity for such limitations is apparent, when it is considered, in the first place, that in numerous instances, a party, in making communications most injurious to character, is not a free agent, but necessarily acts under legal authority and compulsion. Thus, in every civilized state, such communications are necessary, with a view to the administration of justice, and it requires no force of argument to show how seriously the course of justice would be impeded, if judges, jurors, and witnesses, who acted merely in obedience to the law, were to be subjected to the ordinary action for slander, in respect of the communications which they were obliged to make. It is matter of obvious policy and convenience, that great latitude should be afforded in respect of such communications as are necessary for the ordinary exigencies of society, and the mischief and inconvenience would be great, if those were to be fettered and restrained by the perpetual apprehension of litigation.

If, then, the claim to damages ought, on grounds of extrinsic policy, to be limited by the occasion and cir-

cumstances, are these, and in what instances, to operate as an absolute and conclusive exception, independently of the question of intention; and, again, in what instances are the occasion and circumstances to operate as a qualified bar, taking into consideration the *real motive and intention* of the author or publisher.

So essential, on grounds of policy and expediency, is it that in some instances the occasion of publishing should constitute an absolute and peremptory bar to the total exclusion of civil liability, in respect of the publication of injurious matter, and that, in others, the occasion should constitute not an absolute, but a qualified bar, subject to a consideration of the actual intention of the publisher, that these general distinctions are probably common to every system of municipal law, subject, nevertheless, to particular modifications.

First, then, within what limits ought the particular occasion to operate as an *absolute bar*, independently of the motive and intention with which the communication was made.

It is observable, in the first place, that such an absolute and peremptory bar, with one exception, (that is, where the imputation is true,) seems to rest wholly on principles of external policy, for it is obvious, that in all cases, where one man, with a malicious and deliberate intention, occasions damage to another by false and calumnious representations, he is bound to make compensation, both according to the plain principles of natural justice, and according to the ordinary maxims of municipal law, and, therefore, that any exemption from such responsibility must necessarily depend upon some external consideration of policy and convenience. In other words,

that for some reason or other, less of mischief and inconvenience would result to society from denying a remedy in that class of cases, than on the other hand would accrue, if the ordinary remedy were accorded. This class of cases, therefore, does not admit of any general, and, as it were, natural limits and boundaries, without reference to the state, condition, and circumstances of the particular society, for whose governance the law is intended, and the general system and spirit of its institutions. It is easy, however, to see that, as a matter of extrinsic policy, such a protection ought to be extended principally in those instances, where the parties act under peremptory legal obligations, in the discharge of duties of so important and essential a nature, that it might be attended with great public inconvenience, to allow their motives to be called in question, and to subject them to ordinary actions of defamation. Such principles, applied to our own constitution and circumstances, would obviously include communications made in parliament, and, in all countries, to those made by judges, jurors, and witnesses, in the ordinary course and administration of justice (f).

(k) The title of one section in Mr. Borthwick's Law of Libel in Scotland is "*of privileged cases, where the capacity alone, in which the defender has acted may amount to a complete justification.*" And this absolute or peremptory privilege, which protects the party from an action for slander, without any regard to his motive or intention, applies to all communications by judges, jurors, and witnesses, acting as such. The Lord Advocate is not liable to an action, in respect of any action which he institutes, however unfounded it may turn out to have been, yet he is compellable to disclose the name of his informer, who is liable to statutable penalties, as a false and calumnious accuser. Such a

There is also one class of cases, where, although the communication be in fact false, yet where it is founded

proceeding is closely analagous to the English action on the case for a malicious prosecution.

Mr. Borthwick states his opinion, that the law of England, which considers the publication of the proceedings in parliament, or in the ordinary courts of justice, as absolutely privileged, is applicable to the Scotch practice, but with considerable abatement. And it appears that the practice, which has prevailed in England, of publishing *ex parte* proceedings, even in criminal cases, has been frequently reprobated by the judges in Scotland. In the case of *Stewart v. Allan*, Dec. 31, 1818. Lord President Hope, in delivering his opinion, observed, "a newspaper, while it confines itself to the discussion of political affairs and public occurrences, is useful and worthy of encouragement, and the liberty of the press has been more important for the maintenance of our liberty than any other public right enjoyed by the people of this country. But what has the liberty of the press to do with the miserable law suits of individuals? And, in particular, I desire, from this chair, to say, whatever may be the practice in England, what have newspapers to *do with law suits during their dependence*, or with prosecutions in criminal cases before they are concluded? It is the most mischievous and monstrous abuse of the liberty of the press that I can imagine, to publish garbled statements of judicial proceedings, *which such accounts will generally be*, and thus to excite unfavourable impressions against one of the parties; I am astonished at what I see in the other end of the island—not only reports of *civil cases* published under such circumstances as may tend to prejudice the jury and the judge, but, to my amazement, you see precognitions taken, with a view to prepare for the trial of criminals, and which must have the effect of instilling prejudices into the minds of those who are afterwards to try their case. *Such practices are unknown here, and I hope they will always be so.*"

It seems, however, to be perfectly well settled, that, by the law of England, the publication of *ex parte* criminal proceedings will subject the publisher to criminal, as well as civil consequences, and the better

on reasonable and probable cause, the occasion may exempt from legal responsibility, notwithstanding the malicious and hostile motive of the accuser. The principle of immunity, in this case, is one of extrinsic policy, which affords protection to the party, though he commits a wrong, morally speaking, out of regard to the inconvenience which would result from discouraging men from making such communications. The principal instance of this class of cases is, that of a false and malicious prosecution. One who makes a criminal charge for the mere gratification of private malice, acts immorally, though there be probable ground for making it; and if no extrinsic consideration of policy intervened, there would be great reason for holding that such a charge should not be made but at the peril of the voluntary accuser, and that he ought, if he failed to substantiate his accusation, to make reparation to the party whom he had accused maliciously, and as it turned out, contrary to the truth. But a consideration of public policy intervenes, it is for the interest of society that investigation should take place in all

opinion seems to be, that the same will extend also to the publication of mere *ex parte* civil proceedings of a defamatory nature. See the authorities, vol. 1, p. 257, and also Lord Hale's opinion, St. Tr. vol. 3, p. 543.

The constituting the occasion a peremptory bar to an action, without regard to malice, though the law of Scotland regards malice as of the essence of the offence, is reconciled by considering the criminal intention as rebutted or redargued by evidence of the occasion, which is thus made to operate as a *presumptio juris & de jure*. This, it is obvious, is but a circuitous mode of saying, that in one class of cases, the question of malice is immaterial, and intention ceases to be a test of responsibility.

cases where there is reasonable and probable cause for inquiry, and, therefore, the question arises, whether it would be productive of greater inconvenience to deny the individual remedy in such cases, that is, where a probable cause for preferring the charge existed, or to discourage prosecutions by allowing the remedy.

In the next place, still assuming that the complainant has sustained some injury from the publication of that which is in its own nature noxious and detrimental, the occasion of publishing may supply a *qualified* bar or defence to the action, dependent on the *real motive* and *intention* of the publisher.

This is a distinction, which, on considerations of natural justice, coupled with those of external policy, necessarily comprehends a numerous and important class of publications, affecting character and reputation. To prohibit communications, however necessary they might be in the ordinary intercourse of society, and however confidential in their nature, in all cases where they might occasion mischief to an individual, would be to impose restraints and fetters on mutual intercourse, which would, at the least, be inconvenient, if not intolerable. No one would be able to give a character of a servant, or even venture to give his opinion of an inn or tavern, for fear of an action. And, on the other hand, to allow every individual maliciously to deal out malignant calumnies, under the cloak and colour of privileged communications, would as little consist with the convenience and comfort of society, as with the principles of morality and natural justice.

The common and daily intercourse of mankind for the purposes of business, the ordinary exigencies of so-

ciety, require that communications be made, though they may be prejudicial to particular individuals; it would be vain and impolitic to endeavour to prohibit them.

But it is not for the convenience, but greatly to the prejudice of society, that false and injurious communications should be made, not in order to the furtherance of any good or beneficial object, but for the gratification of an evil and malicious disposition; here, then, is a plain and obvious limit to such communications. Where they are made honestly, and *bond fide*, with a view to the exigencies of society, they are privileged on principles of policy and convenience, though the party who made them was mistaken, but when they are *falsely* and *maliciously* made, they are not protected by any principle of convenience or utility, and therefore cease to be privileged.

The principle of qualified exemption, where the condition of immunity is integrity of intention, or, at least, the absence of actual malice, comprehends all cases where a communication is made *honestly*, with a view to the discharge of any legal, or even moral duty, incident to a state of civilized society. Such communications, it is obvious, ought to be protected, whenever they are made sincerely, and not with an actual and malicious intention to defame.

This principle, therefore, includes all cases where the communication is made in confidence to another, on a subject in which he possesses an interest. As where a party gives a character of a servant, or makes the communication in the way of admonition or advice, or in the fair and *bond fide* furtherance of the in-



terests of others, or even of his own. In respect, therefore, of this class of cases, that is, where an occasion exists, which, if fairly acted upon, furnishes a legal protection to the party who makes the communication, the *actual intention* of the party affords a boundary of legal liability; if he had that legitimate object in view, which the occasion supplies, he is neither civilly nor criminally amenable, if, on the contrary, he used the occasion as a cloak of maliciousness, it can afford him no protection (l).

(l) With respect to this extensive class of cases, the laws of England and of Scotland, proceed on the general principles stated in the text, and *malice in fact*, is the test of civil and criminal liability. According to the doctrine of the Scotch courts, the occasion operates as a *presumptio juris*, or as *prima facie* evidence of the absence of a malicious intention to injure, and proof of the contrary is thrown on the pursuer. See Borthw. L. L. 213. And, according to the law of England, *infra*, vol. 1, p. 292, there are numerous cases of privilege, where proof of actual malice is essential to support the action. The extent to which the privilege is allowed to operate, seems to be the same in Scotland, and is illustrated by Mr. Borthwick, in its application to cases of characters given to servants, of speeches by advocates, of literary criticism, and in general of any communication made either by or to one who has an interest in the making it. The following instance may be cited by way of illustration :—A person, who was in the habit of sending his grain to a mill to be made into meal, had discovered a contrivance, by which the miller abstracted a part of all the grain brought to his mill. He immediately communicated his discovery to all those who tholed at the mill, and also to all those who voluntarily employed it. Upon an action being brought by the miller, before the sheriff of the county, the judge deemed the case to be a privileged one, the communication having been made by a person who had sustained an injury, to others who had been also injured by the pursuer's dishonest conduct, and who had therefore an interest to be made acquainted with it. The defender of

And here it is to be observed, that as the honesty and integrity with which a communication of hurtful tendency is made, cannot exempt from civil liability, unless it be coupled with an occasion recognized by the law, so, on the other hand, responsibility ought immediately to attach, where the mode or nature of the communication in any respect exceeds that which the legal occasion warrants. For as to the excess, no legal justification or excuse arises from the occasion, and the case stands on the same footing, as far as regards such excess, with any other communication made without lawful excuse, that is, the mere absence of express malice, cannot justly repel the action. And, therefore, though A., knowing that B. was about to employ an agent, whom he, A., suspected to be a man of unprincipled character, would be justified in communicating his knowledge to B., although he was in fact mistaken, yet he would not be justified in doing so in the hearing of other persons who were not interested in the fact; for the occasion warrants a communication to B. only, and as to the rest, it is mere excess, not warranted by the occasion; and though A. might really be influenced by the honest motive of warning B. of the danger he would incur in employing such an agent, yet he acted

ferred to prove the truth of the information, which the sheriff allowed. The miller denied the fact, but he argued that, at any rate, the defender had no privilege or title to take the method he had done to check the evil, and, on that ground, ought not to be allowed to show the *veritas convicii*, and to this effect he brought the proof before the court of session, by a bill of advocacy, which their lordships refused. Borth. L. L. 236.

illegally in depriving the latter of his character unnecessarily, and upon *suspicion only*. If, indeed, he knew, and could prove the truth of his communication, he might well justify a publication to all the world; but that is a defence which stands upon an entirely different foundation.

If A. really suspected that the agent was a dishonest man, the law, founded on the principles just announced, would protect him in making the communication *bonâ fide* to B., though in truth he was mistaken; the honesty of his design, superadded to a legal occasion, would constitute a full defence; but when he makes the communication to *others*, the occasion, as far as concerns the communication to them fails, and he ought, on the plainest principles of natural justice, to be responsible for a wilful and wanton derogation from the right of another, by *unnecessarily* making a charge which turns out to be *false*.

Having thus briefly noticed the principal circumstances which seem to be essential to the limitation of freedom of communication, for the sake of security of character to individuals, and the natural boundaries which appertain to such limitations, the subject is now to be considered in reference to the welfare and security of *the public* (*m*).

(*m*). It is remarkable that, by the law of Scotland, four different objects may be combined in a proceeding for libel.—1. For a reparation for damages sustained in property.—2. A *solutum* commensurate to the plaintiff's *mental* and personal sufferings.—3. For penal censures, *ad vindictam publicam*.—4. For a palinode. See Borth. 34. By the

Here, pursuing the same course as before, the questions are, 1st, whether restraint be necessary for the securing the interests of the public? 2ndly, What are the proper modes and limits of restraint?

In the first place, the necessity for some degree of restraint is of too obvious a nature to require more than a few cursory remarks. It is plainly essential that the laws of every civil society should provide not only against attempts to produce a violent and premature dissolution of its existence, but also against indirect as well as direct endeavours to violate its particular regulations and ordinances, and bring them into contempt.

To a perfect system of jurisprudence, no laws can be more essential and important than those which protect the very existence and safety of the civil constitution itself. It would be in vain to erect the poli-

civil law, though the ground of the remedial and criminal proceeding, in case of libel, was identical, yet the actions were kept distinct.

According to the law of England, an entire distinction is preserved between civil and criminal proceedings in cases of libel, except, perhaps, in the single instance of an action of *scandalum magnatum*, under the statutes, vide vol. 1, p. 175.

The law of England, formerly, combined criminal and civil proceedings to a far greater extent. In an action for the abduction of a wife, the offender even now is not only liable to damages to the injured husband, but also under the same statute, (1st of West.) to two years' imprisonment. And the form of proceeding in a civil action of trespass, *vi et armis*, to this day, shows that the guilty defendant was also liable to pay a fine to the king, for his breach of the public peace. Such considerations are not merely of a formal and technical nature; the tendency of such combinations is to annex incidents in common, which ought, for convenience sake, to be annexed separately.

tical edifice, without at the same time securing its foundations.

Where the immediate end and object of communications, whether oral or written, is the total subversion of the civil constitution, they necessarily rank, in degree, with other treasonable practices against the state.

Where they amount to direct incitements, to commit some specific violation of a particular law, the offence must necessarily be nearly of kin to an actual violation of that law; if an actual breach of the law be the consequence of such a solicitation or incitement, the act amounts to an absolute and complete transgression of the law, and even though that consequence should not follow, yet a deliberate attempt to break the law must necessarily constitute an offence which, in principle at least, calls for penal visitation.

And the necessity for restraint applies to indirect, as well as direct solicitations, to violate the law; for, as the latter may be equally efficacious, they are equally dangerous with the former, and ought, therefore, to be equally prohibited. But further, it is obvious that the security of a state may be endangered not only by direct and immediate attempts to subvert it, but even still more successfully, by bringing its establishments, civil and religious, or its ministers and officers, into disgrace and contempt; that the state and reputation of individuals are as much or more exposed than even their persons or property to malicious and insidious spoliation, and that men may be excited and provoked to commit acts of violence by collateral insults, as well as by the most open and direct solici-

tations. It is, therefore, essential to the security of every civil government, as well as to the preservation of its establishments, the due observance of its laws and ordinances, and protection of its members, that restraint should be imposed, as well upon indirect as direct attempts of this nature.

There are other evils equally serious, against which security is necessary. Mere positive laws are of little avail, without the powerful aid of religion and morality; it is therefore of great importance, to the well-being of society, that its interests should be protected against the pernicious influence of communications tending generally to extinguish men's religious faith, and to eradicate from their minds the principles of morality.

For though human laws which ought to be definite and precise, which must be of limited extent, and which command not but where they can compel, cannot be co-extensive with the obligations of morality; and although by far the greater part of the ordinary duties of a member of society, fall not within the scope of any positive municipal laws, but must be left to every man's sense of propriety and conscience, and to a salutary dread of public censure, the same difficulties do not apply in restraining generally, by positive laws, such communications as tend to instil bad principles or extirpate good ones, and which, consequently, tend not only to the disregard and neglect of all the moral, as well as legal duties of life, but to the active practice of every species of immorality. To restrain such attempts is the more necessary, when it is considered, that for the performance of most of the common duties of life, undefined by positive law, and

for the préservation of decency and good order, religious and moral principles, and the dread of public censure, are the only securities.

Such considerations become infinitely more strong and important, when they are considered in reference to the facility of communication, supplied by the art of printing, especially where its operation is still further extended by a general system of national education, which, in effect, subjects to its power the great mass of the public.

The press is, indeed, a mighty instrument for the diffusion of knowledge, capable of being applied to the best, or perverted to the worst of purposes; eminently useful in promoting the interests of religion, morality, science, and social happiness, it may be abused as the instrument of impiety, vice, error, and malice. When, therefore, it is considered how much, not merely the opinions, but the feelings and passions of the public, are capable of being influenced and excited by means of this powerful agent, how few there are who think for themselves, and who are not, it may be insensibly, guided and moved by the opinions of others, how great a dominion may be exercised by one strong mind over those of millions, how favourable the generality of mankind are to the reception of the most calumnious charges; how credulous in listening to the most improbable misrepresentations; and how greatly every calumny, directed against an individual, is aggravated by increased publicity; when these things are considered, it will readily appear, of what supreme importance it must be in every system of municipal law, on the one hand to protect the liberty of communica-

tion, and on the other to exclude the complicated and frightful mischiefs which must necessarily emanate from a corrupted, venal, and licentious press.

What, then, are the proper mode and measure of restraint? Public security must be provided for, either by imposing *previous restraints*, or admitting the general right to publish, by subjecting those who abuse the privilege to *subsequent punishment*.

And such *previous restraints* are either absolute or qualified.

The notion of *absolute* exclusion is too extravagant to require attention; it is a scheme calculated only for extreme cases, that is, either for a state of complete despotism, where the condition of the people cannot be worse, and where it is the policy of the oppressors to prevent its becoming better, or for a state of absolute, but, alas, ideal perfection, where, *ex hypothesi*, every alteration must be for the worse, and where to change and to repent are convertible expressions (n).

What shall we say, then, of that kind of modified intellectual dominion, which not only may be, but has been exercised, even under a constitution in other respects free (o), that is by subjecting the press to the control of a public licenser.

(n) It is scarcely necessary to remind the reader, that Sir Thomas More, in his *Eutopia*, makes the discussion of political affairs punishable with death.

(o) M. Delolme, in his *Essay on the Constitution of England*, observes, "This privilege (of our press) is that which has been obtained by the English nation with the greatest difficulty, and latest in point of time, at the expense of the executive power. Freedom was, in every other respect, already established, when the English were still, with



At this day, and in this country, where the liberty of the press has so long been beneficially enjoyed, though not without both great and frequent abuse, little need be observed on the subject of censorial restraint.

regard to the public expression of their sentiments, under restraints that may be called despotic. History abounds with instances of the severity of the court of Star-Chamber, against those who presumed to write on political subjects. It had fixed the number of printers and printing presses, and appointed a licenser, without whose approbation no book could be published. Besides, as this tribunal decided matters by its own single authority, without the intervention of a jury, it was always ready to find those persons guilty whom the court was pleased to look upon as such: nor was it, indeed, without ground, that the Chief Justice Coke, whose notions of liberty were somewhat tainted with the prejudices of the times in which he lived, concluded his eulogiums on this court, with saying, 'The right institution and orders thereof being observed, it doth keep all England in quiet.'"

After the Court of Star-Chamber had been abolished, the Long Parliament, whose conduct and assumed power were little better qualified to bear a scrutiny, revived the regulations against the freedom of the press. Charles the Second, and after him, James the Second, procured further renewals of them. These latter acts having expired in the year 1692, were at this era, although posterior to the revolution, continued for two years longer, so that it was not till the year 1694, that in consequence of the parliament refusing to prolong the prohibitions, the freedom of the press was finally established.

The principle of restriction, by the discretion of a public licenser, still exists, in a very limited degree, in the instance of dramatic representations. By the st. 10 G. 2. c. 28. no dramatic composition can be represented on any public stage, without the previous license of the Lord Chamberlain. And by some particular statutes, regulations are made to facilitate proceedings, civil, as well as criminal, against the publishers of newspapers, and certain pamphlets. See Treatise, vol ii. p. 43—313.

Upon the question, whether such a mode of restraint would be expedient, that is, whether it would exclude more of evil than it introduced, it is very material to recollect, in the first place, that the comparison is not between the evils occasioned by such restraint on the one side, with those which would result from a *total* absence of restraint on the other, but merely with the excess of such evils, beyond the amount to which they may be corrected in the ordinary course of justice, that is, by inflicting penal visitation on those who, being allowed to publish without previous impediment, abuse that license, by publishing what is noxious and illegal. For it cannot be doubted, that it would be attended with a less degree of inconvenience, and would interfere far less with the natural liberty of the subject, to inflict penal censures on those who abused the right of free communication, than to extinguish the right, by subjecting every publication to the summary control of a licenser.

To impose a general interdict on society, rather than restrain an evil by the punishment of a few, and those, such as had actually offended; to deprive all of the exercise of a valuable privilege, because some would abuse it, would truly be to sacrifice the wheat for the sake of rooting up the tares; it would be to exclude all that was good, because it was mixed with partial evil, a principle which, were it applied on all occasions where mischief were to be prevented, would speedily exclude every thing that was good and valuable. What privilege do we boast, what blessing do we enjoy, which is not greatly, and even frequently abused?

If then the evil to society from an abuse of the liberty of free communication, or as it is usually termed the liberty of the press, could be sufficiently corrected and restrained, by punishing such as really offended without any surrender or sacrifice of the general right to publish, there would be an end of the question, and the subjecting the press to the control and dominion of a licenser, would be an unnecessary sacrifice of a most valuable portion of the liberty of the subject. But, again, were it even to be admitted, that penal inflictions constituted a restraint inadequate to the correction of the press, which, so long as those inflictions may be indefinitely extended, according to the magnitude and frequency of offences and the exigencies of the times, it is difficult to suppose; yet still as it must, on the other hand, be allowed, that such penal restraints must check and correct the mischief which would otherwise result to society, to a very great extent, it is obvious, that it is only the excess of mischief, which cannot be so corrected, that ought fairly to be weighed against the evils which would arise from the establishment of a public licenser.

In general, civil liberty has been well defined to consist in the not being restrained by any law which does not conduce, in a *greater degree*, to the public good (o).

(o) In what, then, does the liberty of the press precisely consist? Is it liberty left to every one to publish any thing that comes into his head; to calumniate, to blacken whomsoever he pleases? No; the same laws that protect the person and property of individuals, do also

Until, therefore, it were shown that the liberty of free and unreserved intellectual communication, on all subjects of common interest, ought, for the public good, to be surrendered to the exercise of an authority and dominion arbitrary and irresponsible, the contrary ought to be inferred, it would argue a strange degree of apathy, even folly, to sacrifice so valuable a portion of natural liberty, without the fullest conviction that at the least an equivalent was received in return, and the burthen of proof would clearly be incumbent on those who advocated such a surrender. How difficult must such proof be, when experience, the best and safest guide, bears testimony to the inexpediency of such a sacrifice (*p*).

protect his reputation : and they decree against libels, when really so, punishments of much the same kind as are established in other countries. But, on the other hand, they do not allow, as in other states, that a man shall be deemed guilty of a crime for merely publishing something in print, and they appoint a punishment only against him who has printed things that are in their nature criminal, and who is declared to be guilty of doing so by twelve of his equals appointed to determine on his case.—Delolme.

Those laws are the most favourable to liberty which define that which is criminal, and, consequently, make liberty the general rule, and a penal restraint the exception. M. Delolme who had conceived high notions concerning the liberties of Englishmen, had supposed that every action was secured by positive laws carefully worded, and was at last surprised to find that the liberty of the press was founded simply upon the absence of prohibition.

(*p*) A very popular ethical writer has thus expressed himself upon this subject. "If nothing may be published but what civil authority shall have previously approved, power must always be the standard of truth : if every dreamer of innovations may propagate his projects,

One of the most obvious evils which would result from previous restraint on the liberty of the press, un-

there can be no settlement: if every murmurer at government may diffuse discontent, there can be no peace: and if every sceptic in theology may teach his follies, there can be no religion. The remedy against these evils is to punish the authors, for it is yet allowed, that every society may punish, though not prevent, the publication of opinions which that society shall think pernicious: but this punishment, though it may crush the author, promotes the book; and it seems not more reasonable to leave the right of printing unrestrained, because writers may be afterwards censured, than it would be to sleep with doors unbolted, because by our laws we can hang a thief."

The most satisfactory refutation which can possibly be given to a theoretical suggestion of danger, is that which experience supplies, the press in this country has, for considerably more than a century, been rescued from the control of a licenser, yet peace, tranquillity, and religion still survive amongst us.

But, surely, with all respect to the memory of one who was justly accounted a giant in his day, it is but weak and timid policy to surrender a privilege estimable and valuable in its own nature, because it may be perverted and abused. If men are to be prohibited from public communication by writing or printing, if the pen and press are for this reason to be placed under arbitrary restraints, why should even the tongue be privileged? Why should any man be allowed to speak in public, when it is possible that he may utter sedition or blasphemy? Why allow books to be printed at all; for the very arbiters of religion, politics, morals, and taste, may, as well as others, be subject to error or even corruption; and what would the state of society be, when not only were vicious and corrupt publications sent forth under the sanction and impress of public authority, but all that was really edifying and instructive was wickedly suppressed. The liberty of the press and rational freedom of public discussion are the real bolts and bars by which alone depredators on the religious and political rights of society are to be shut out, and the interests of the community preserved. To destroy these would, in a political sense, most surely be to sleep

der a constitution where the people were possessed of influence, would be the destroying, or at least weak-

with doors unbolted, without even the poor consolation of being able to hang the thief.

When the art of printing was discovered, it was justly apprehended that it would prove an instrument of mighty force in its operation on public opinion in all matters of great and common interest. But though many generations have now elapsed since the date of this noble invention, its operation was necessarily restrained and limited, whilst the great mass of the people, consisting of those who were most likely to be influenced by its means, were unable to read; it was reserved for later times, to give an impetus to its powers, by extending the means of knowledge to the lowest classes, and opening to a portion of society, far exceeding the rest in numbers and physical strength, the sources of knowledge, and thus affording them the means of judging, and, what is of greater importance in a political point of view, of acting for themselves. It is to this important change in circumstances and education, as well as to the great increase of wealth and population in this country, that the multiplication of newspapers, the principal vehicles for the communication of public measures and events, and of the various opinions and comments to which they give rise is to be attributed.

Whether it were wise or politic to encourage so great a change, belongs not to the present occasion to consider. That no evil consequences have as yet resulted, which can be at all placed in competition with the splendid advantages of an open and free press, or to induce the most timid to regret its emancipation, seems to be most certain. It is only from the licentious abuse of our liberty that danger is to be apprehended; and those are justly to be regarded as the greatest enemies to freedom, who, by their perversion of the blessing, endeavour to render it a curse, and who endanger the liberties of all, by abusing the most valuable of their own, for unworthy, base, and venal purposes.

The transition is by no means difficult or improbable from a licentious abuse of liberty to severe and excessive restraint; in such respects, the danger always is of running into extremes, to escape one pressing evil, mankind are too apt to seek an insecure refuge in its opposite.

ening, the mutual confidence which ought to subsist between the people and the government, and which is essential to a vigorous administration of public affairs.

Under such a constitution, public confidence must rest on public opinion, and public opinion cannot be manifested, or even exist, unless the measures of government be known, and be subject to free discussion and comment (*q*).

Such a government, from which public confidence and public support are withdrawn must necessarily be timid and indecisive in all measures of importance; the responsibility of those who conduct public affairs, is greatly increased in pursuing a course of which the body of the people disapproves, whilst their means of accomplishing objects of magnitude and difficulty are necessarily diminished, and that energy and spirit to which public approbation and applause are essential, are weakened and impaired.

Nor is public confidence, in the administration of affairs, more essential to internal safety, than it is to security from abroad. It were absurd to sup-

(*q*) M. Delolme, in his *Treatise on the Constitution of England*, (p. 292. ed. 1816.) observes, on this subject, "we may therefore look upon it as a further proof of the soundness of the principles on which the English constitution is founded, that it has allotted to the people themselves the province of openly canvassing and arraigning the conduct of those who are invested with any branch of public authority" and that it has thus delivered into the hands of the people at large, the exercise of the censorial power. Every subject in England has not only a right to present petitions to the king or the houses of parliament, but he has a right to lay his complaints and observations before the public by means of an open press.

pose that a government could command respect abroad, which was hated or despised at home. Such a condition of things must necessarily engender among foreigners an opinion of internal weakness, and for a nation to be weak, or even to be accounted so, is to be contemptible and insecure.

The advantage of free and unrestricted communication, on all political subjects, is great and reciprocal; if the people have thus an opportunity of forming and expressing their opinion on public measures, those who administer affairs have also the means afforded them of becoming acquainted with the disposition, sentiments, and wishes of the people, of availing themselves of beneficial and useful suggestions, of affording explanation and redress where complaints are well founded; in short, of securing that esteem, respect, and confidence on the part of the people which are essential to an useful and vigorous administration (*r*).

The liberty of political discussion is valuable, inasmuch as it tends to preserve stability in the political constitution, enables the people to exert a salutary influence, and prevents violent and sudden changes (*s*).

(*r*) *Nec vero negligenda est fama nec mediocre telum ad res gerendas existimare oportet benevolentiam civium. Cic. de Amic. 502.* Though some make slight of libels, yet you may see by them (observes Selden,) how the wind sits. As, take a straw, and throw it up into the air, you shall see by that which way the wind sets, which you shall not do by casting up a stone; more solid things do not show the complexion of the times so well as ballads and libels.—Selden's Table Talk.

(*s*) The liberty of the press, which consists in the liberty which every subject possesses of publishing what he will, without previous restraint, subject, however, to penal censures if he publish what is



These, however, are positions which must be carefully limited to those cases where the constitution is con-

malicious and illegal, constitutes the great excellence of the British constitution. On this subject we may trust to the evidence of learned foreigners, without fear least the judgment should be warped and biassed by native prejudices. M. Cottu, a learned advocate of Paris, after having devoted much personal attention to the laws and constitution of this country, thus expresses himself. "The liberty possessed by all classes of the nation, of acquainting government legally, and without recurring to mobs and insurrections, with their private opinion on all the measures of administration, forms the main perfection of the English constitution."—Cottu, 194. (English Translation.)

And again,

"Whenever any important subject is submitted to the discussion of parliament, the king and the two houses have the advantage of seeing clearly the nation's opinion on the proposed measure, and ascertaining how far it should be pressed or abandoned; and it is thus that the strength of the people, which, united in one single mass, would form a torrent, whose accumulated waves might, at the first obstacle, overwhelm the government, is divided, on the contrary, into an infinite number of individual bodies, resembling a number of peaceful brooks, which adorn and fertilize the plains they water, without the power of ever doing mischief."—Ib. 196.

On such subjects, the treasures of history contribute less of information than on any other subject of public interest and policy. Were the laws of ancient nations more comprehensive and complete than we find them to be, a total change in those essential circumstances to which the restrictive laws are adapted, would require a corresponding alteration in the laws themselves. The ordinances by which a great nation composed of subjects jealous of their freedom, amongst whom political knowledge is daily diffused by means of the press, who take a lively interest in all public measures, and who possess the means of expressing their opinion on such subjects, can afford but few points of comparison with any former age or country. When the art of printing was yet un-

structed on a fair and equitable basis, that is, where no larger a portion of natural liberty has been surrendered for the common good than is necessary for that end, or, at all events, where there is no great and striking disproportion between the benefit received and the price paid for it; in all other cases this species of liberty would tend to produce political changes and alterations rather than stability. Under a rigid democracy, or any other kind of government where the people, highly tenacious of natural liberty, contributed too small a portion of it to render the government sufficiently strong and effective, it is natural that demagogues, ambitious of popular influence, should abuse their unsundered excess of power to exalt each his own individual authority; in such a case, it is obvious, that unrestrained freedom of political discussion would be very ineffectual towards securing peace or permanency in public affairs. In such instances, even fair comment would but betray to the thinking and rational, the weakness, inefficacy, and instability of their political system, and induce them to wish for change, whilst party zeal, instead of attributing the mischief to its true cause, the want of a supreme power, possessing reputation, confidence, and

known, the great mass of the people, destitute of information, could seldom be moved, but on great and sudden occasions, to make any important political exertion, and then only by fits and starts, according to the operation of violent and transitory causes. How much happier are the times when force and violence give way to reason, when the strong and speedy expression of public opinion often produces greater results than could formerly have been obtained by a sanguinary appeal to arms.

*strength*, sufficient to secure the public peace from repeated aggressions by turbulent factions, would but foment successive struggles for popular ascendancy by mutual and intemperate recriminations, at the expense of a constant diminution of public strength and security.

On the other hand, under an arbitrary and despotic form of government, where the people had surrendered too large a portion of their liberties, discussions tending to show the inexpediency of their political condition, would necessarily tend also to render the people discontented, dissatisfied, and anxious for change, whilst it would be the interest of those who thus possessed an excess of power beyond what was just, to prevent and hinder such communications, in order to oppose that tendency. And it is obvious, that in proportion to the degree of oppression under which the people laboured, the stronger would be the motive with those in power to suppress the discussion of public measures and silence remonstrances, for the greater would be the probability of change, either reluctantly yielded to the influence of public opinion, or compelled by an appeal to force. And thus it is that, under a state of absolute despotism, where a successful tyranny has reduced the people to the ultimum in servitude, it becomes a necessary incident to the same wicked policy to compel men, not to forget their wrongs, for memory must remain to the most abject, but to suffer them in silence (*t*).

(*t*) Dedimus profecto grande patientiæ documentum et sicut vetus

**It is only under a just and equitable constitution that freedom of discussion tends to the desirable ends of**

*ætas vidit quid ultimum in libertate esset, ita nos quid in servitute, adempto per inquisitiones et loquendi audiendique commercio. Memoriam quoque ipsam cum voce perdidissemus si tam in nostrâ potestate esset oblivisci quam tacere. Nunc demum redit animus, &c.* Such were the affecting observations of Tacitus, in describing the happy transition to the government of Trajan from a state of abject suffering under the rod of Domitian.

The Emperors Julius and Augustus had the magnanimity to despise, or at least the prudence to overlook, many instances of personal calumny against themselves.

*Antonii epistolæ, Bruti conciones, falsa quidem in Augustum probra sed multâ cum acerbitate habent. Carmina Bibaculi et Catulli referta contumeliis Cæsarum leguntur. Sed ipse Divus Julius ipse Divus Augustus et tulere ista et reliquere; haud facile dixerim moderatione magis an sapientiâ, namque spreta exolescunt, si irascere adgnita videntur; non attingo Græcos quorum non modo libertas etiam libido impunita, aut si quis advertit dicta dictis ultus est.*

These were the observations attributed to Cremutius Cordus, who was accused, under the gloomy reign of Tiberius, with having extolled Brutus and Cassius, and asserted that Cassius was the last of the Romans. *Postulatur*, says the historian, *novo ac tunc primum audito crimine quod editis annalibus laudatoque, M. Bruto C. Cassium Romanorum ultimum dixisset. Accusabant Satrius Secundus et Pinarius Natta, Sejani Clientes; id perniciosum reo et Cæsar truci vultu defensionem accipiens.* So little hope had the unfortunate orator of experiencing clemency or even justice, that, after making his defence before the senate, he sought death in abstinence. One of the most bitter reflections on the memory of Tiberius, as a ruler, is the record of the historian, that a solitary act of clemency to a libeller diffused a transitory feeling of satisfaction (*modica lætitia*) over a desponding people.

*His tamen assiduis tamque mœstis modica lætitia interjicitur quod C. Cominium Equitem Romanum probrosi in se carminis convic-*

peace, permanency, and security. Where a reasonable and fair proportion exists between the quantum of liberty which is surrendered, and the advantages derived from a free constitution and equal laws, the people are little, at all events they are much less likely, to be influenced by the desire of change, and the more they know and discuss the nature of their political system, the greater must be their attachment to the existing state of things, whilst the notoriety of all public measures, the privilege of free discussion, of openly expressing public opinion, and the degree of influence which that opinion must necessarily possess (*u*), tend to inspire the people with confidence in their rulers, and diminish

tum Cæsar precibus fratris qui senator erat concessit. Tac. *Annal.* l. 4.

According to M. Montesquieu, "no government is so averse to satirical writings as the aristocratical. There the magistrates are petty sovereigns, but not great enough to despise affronts. If in a monarchy a satirical stroke is designed against the prince, he is placed on such an eminence, that it does not reach him, but an aristocratical lord is pierced to the very heart. Hence the decemvirs, who formed an aristocracy, punished satirical writings with death."—B. 12, c. 13.

It may, for reasons hereafter given, be doubted, whether the decemviral law was so severe as M. Montesquieu supposes, there is at least no proof that so cruel a law was ever enforced to its extent. On the other hand, Augustus and Tiberius first violated the law by a tyrannical construction, which brought satirists within the penalties of treason, and subjected them to capital punishment.

(*u*) M. Delolme, in his *Essay on the British Constitution*, after commenting on the effect of laws which allow to the people full scope for the expression of their sentiments, concludes his observations with the following remarks:—

"In short, whoever considers what it is that constitutes the moving

the probability of popular disaffection and civil commotion.

On the other hand, the same considerations render any encroachment upon the liberties of the people, if not impracticable, at least difficult. It would be impossible that any formidable practices against their interests could long be carried on in secret (*x*), and to

principle of what we call great affairs, and the invincible sensibility of man to the opinion of his fellow-creatures, will not hesitate to affirm, that if it were possible for the liberty of the press to exist in a despotic government, and (what is not less difficult) for it to exist without changing the constitution, this liberty would alone form a counterpoise to the power of the prince. If, for example, in an empire of the east, a place could be found, which, rendered respectable by the ancient religion of the people, might ensure safety to those who should bring thither their observations of any kind, and from this sanctuary printed papers should issue, which, under a certain seal, might be equally respected, and which, in their daily appearance, should examine and freely discuss the conduct of the cadis, the pashas, the viziers, the divan, and the sultan himself, that would immediately produce some degree of liberty."—*Delolme on the Constitution of England*, 303. ed. 1816. Again, the same learned foreigner observes, p. 304, "another effect, and a very considerable one, of the liberty of the press, is, that it enables the people effectually to exert those means which the constitution has bestowed upon them, of influencing the motions of the government."

(*x*) "Private individuals, unknown to each other, are forced to bear in silence injuries in which they do not see other people take a concern. Left to their own individual strength, they tremble before the formidable and ever-ready power of those who govern; and as the latter well know, and are even apt to over-rate the advantages of their own situation, they think that they may venture upon any thing. But when they see that all their actions are exposed to public view, that in consequence of the celerity with which all things become communicated,

make them known, to expose their authors, and subject them to the strong expression of public indignation, would be to defeat their purpose; at all events, would give great facility to resistance, and in proportion, render any such attempt more difficult and dangerous, and ultimate success the more improbable (y).

The influence which the subjection of the press to the control of a licenser must necessarily have on the spirit and manners of a free nation, is not to be disre-

the whole nation forms, as it were, one continued irritable body, no part of which can be touched without exciting an universal tremor, they become sensible that the cause of one individual is the cause of all, and that to attack the least among the people, is to attack the whole people."—*Delolme on the Constitution of England*, p. 318. Ed. 1816.

(y) With regard to those who, whether from personal privileges, or by virtue of a commission from the people, are intrusted with the higher part of government, as they, in the mean time, see themselves exposed to public view, and observed, as from a distance, by men free from the spirit of party, and who place in them but a conditional trust, they are afraid of exciting a commotion, which, though it might not prove the destruction of all power, yet would surely prove and immediately be the destruction of their own. And if we might suppose, that through an extraordinary conjunction of circumstances, they should resolve, among themselves, upon the sacrifices of those laws on which public liberty is founded, they would no sooner lift up their eyes towards that extensive assembly which views them with a watchful attention, than they would find their public virtue return, and would make haste to resume that plan of conduct, out of the limits of which they can expect nothing but ruin and perdition.

The power of the people is not when they strike, but when they keep in awe; it is when they can overthrow every thing that they never need move; and Manlius included all in four words, when he said to the people of Rome—*Ostendite Bellum pacem habebitis*.—*Delolme on the Constitution of England*, p. 321. Ed. of 1816.

garded, on account of its more immediate and important political consequences. What could more directly tend to lower and subdue the spirit of a free people, and to render them unfit for the enjoyment and maintenance of their rights, than to subject their minds to a state of intellectual thralldom? What more effectually restrain and fetter the exertions of genius and of talent, than the melancholy consciousness that their happiest efforts might be rendered fruitless and abortive; that the avenues to fame, honour, and preferment, might be closed against them by the caprice, the ignorance, or it may be the malice of a despotic arbiter, irresponsible, and from whose tribunal there was no appeal. Were ages to be spent in the attempt, no other scheme or device could possibly be discovered so admirably calculated as this, to retard the progress of science and of letters, to hinder all improvement in religion, in politics, or morals, to enervate the public mind and prepare it for every species of degradation.

Finally, the very exercising of such a control would necessarily add greatly to the responsibility of those who administered the affairs of state; for professing to reject all that was injurious, they must be taken to approve and sanction all that they allowed to be published.

It remains to make one or two observations on the abuse of this invaluable privilege. If at any time the public press should have become generally venal, corrupt, and licentious, should teem with profligate and immoral publications, with artful and studied misrepresentations, with wanton calumnies on the characters of the well-deserving, or what is equally offensive with venal



and fulsome panegyric upon knaves, the necessary conclusion would be, that the very condition of society was tainted and unsound. To say that the press is corrupt is but a figurative expression, it means, in reality, that one set of men publishes, whilst the rest of society reads, approves of, and encourages vicious productions.

But if such should be the disposition, or, at all events, the apathy of the public, in regard of the morals of the press, as to encourage or tolerate its ministers in committing licentious violations of truth and decency, it is manifest, not only that the temptation would always be sufficient to ensure a constant supply, at all risks, of scandalous and illegal matter, but that all attempts to earn public favour by honest means would be vain and fruitless.

The public in fact are, or ought to be, the arbiters, directors, and movers of the press (*x*), those who daily

(*x*) Such observations are still more pertinent, where the public, by means of the trial by jury, possess the salutary and constitutional means of control. Upon this subject, Lord Camden, on an occasion of great importance, thus expressed himself. Case of seizure of papers, 11 St. Tr. 323.

“Before I conclude, I desire not to be understood as an advocate for libels. All civilized governments have punished calumny with severity and with reason; for these compositions debauch the manners of the people, they excite a spirit of disobedience, and enervate the authority of government; they provoke and excite the passions of the people against their rulers, and rulers often times against the people.

“After this description, I shall hardly be considered as a favorer of these pernicious productions. I will always set my face against them when they come before me; and shall recommend it most warmly to the jury always to convict, when the proof is clear. They will do well to consider that unjust acquittals bring an odium upon the press itself,

minister to their information and curiosity, are their purveyors and agents. In the discharge of the important and lucrative office of catering for and ministering to the literary appetite of the public, it is manifest that candidates for popular favour must consult the public taste, and that, as there will never be wanting talent, ability, and diligence, adequate to the enlightening and improving the public, so long as veracity, integrity, and ability, are recommendations to their patronage; on the other hand, agents will always be ready to prostitute their talents for the gratification of a corrupt and vitiated taste.

The real corruptors of the press are the public themselves, and the licentiousness of the press, though it tend greatly to increase the evil, is yet to be regarded rather as symptomatic of a defect in public morals, than as the cause of the declension.

If a man patronises a series of licentious publications by purchasing them, or even contributing towards the purchase, what right can he have to complain of the impurity of the public press, the immorality of the age, or the inadequacy of municipal restraint; it is he who offends against truth, against decency and morals, who, with some thousand others, encourages and supports, in a state of affluence, the less guilty minister of the

the consequence whereof may be fatal to liberty; for if kings and great men cannot obtain justice at their hands by the ordinary course of law, they may at last be provoked to restrain that press, which the juries of their country refuse to regulate. Where licentiousness is tolerated, liberty is in the utmost danger, because tyranny, bad as it is, is better than anarchy, and the worst of governments is more tolerable than no government at all."

press ; the latter publishes that which is scandalous and impure, merely because so long as he finds it lucrative to do so, he must necessarily suppose that he gratifies those who pay him for such services. In point of morals, to contribute to the existence and diffusion of noxious and offensive publications, is to share largely in the guilt.

In short, as there can be no greater security for the truth and honour of public, or the integrity of private men, than the wholesome apprehension of public censure, it is of vital importance to society to consider that the preservation of this mighty and salutary moral power, efficacious and entire, rests wholly with the people themselves ; that they must not look for effectual protection from the municipal law, or expect a remedy for the natural consequence of their own supineness ; and that, if by culpable and careless indifference, they suffer the public press to be corrupted and perverted to evil purposes, they not only reject a mighty engine adequate to the protection of their best interests, but surrender it to enemies who will fatally apply it to undermine the very foundations of social happiness.

The abuse of the liberty of the press tends most directly to deprive it of all salutary and beneficial power. The influence of public opinion on political conduct, operates on a mixed principle of shame and of interest, remotely, perhaps, on a feeling of fear, but nothing can more strongly tend to obliterate the sense of shame, and to render men's minds obtuse and callous to the impression of public opinion, than daily attacks upon character, dictated by party feeling, and promul-

gated to the world by a corrupt and venal press. The tendency of a system of misrepresentation, consisting of illiberal abuse on the one hand, and of impure panegyric on the other, must be to confound guilt with innocence in the opinion of the world, to render men equally deaf to the voice of censure or of praise; and when they were no longer deterred from acts of political apostacy and violations of public faith, by a principle of shame, it is obvious, that those very motives of self-interest, which, when connected with the love of character, constitute valuable incentives to useful, laudable, and honourable exertion, would, without such a corrective, tend to the most selfish and unworthy actions; all restraint founded in fear would cease, when the honest fervour of popular indignation had degenerated into the mutual hatred of contending factions.

Next as to the limits of penal restraint. The limits of such restraint must depend on the *nature, quality, and consequences* of the communication; 2ndly, on the *act* of the party who makes it, and the means of communication used; 3rdly, on his *intention*; or, 4thly, on *circumstances collateral* to the act.

First, then, as to the nature, quality, and consequences of the communication. As the very object of coercion is the *prevention* of public mischief; it is by no means essential to an offence of this nature, that the criminal object of a noxious publication should have been actually accomplished, it is sufficient that the communication should directly and immediately *tend* to produce mischief to the public.

And this, for several reasons, both because actual proof of evil consequences to the public would, from the very nature of the case, be frequently impossible, though highly presumable; and, 2ndly, because where great mischief is to be apprehended, it is far more politic to interfere at an early stage, and to arrest the progress of the evil, than to wait for its consummation; and, 3rdly, because, as far as regards the moral guilt of the offender, his offence is completed by the very act of publication.

Hence, as far as the evil consequences of a publication are concerned, it is necessary that the offence against the public should be defined and limited, not by the *effect* actually produced, but by the *tendency* of the matter published to produce it. If, for instance, an individual, with a view to his own private gain, were to publish an address, inciting a discontented populace to burn all stacks of corn within a particular district, the law of the country would be absurd and contemptible, which provided no punishment for so daring an outrage, until proof could be given that some incendiary had destroyed his neighbour's property, in compliance with so unprincipled a recommendation. The very attempt to excite to the commission of such outrages is in itself a dangerous violation of the principles of morality and natural justice: on the question whether such an attempt ought to meet with immediate reprobation and punishment, no conflict of opposite advantages and disadvantages could possibly occur, it would clearly be for the benefit of the community, that so atrocious an attempt should

be checked by penal visitation at the very earliest opportunity.

It is obvious, that it must not only be necessary to restrain communications which tend directly to a breach of the law, by inciting others to the actual commission of crimes prohibited by the law, but also those which tend to the subversion of religion, or, in general, to the destruction of the principles of virtue and morality, which are essential to good conduct, order, and decency. Again, it is plain, that the *degree* of tendency cannot be material as a limit to the offence, whatever its operation may be in adjusting the quantum of punishment. First, because *any* tendency to produce public mischief, must, *pro tanto*, be injurious to society, and, secondly, because the extent to which the mischief may be tolerated, is not capable of any precise definition.

Complaints have not unfrequently been made, even in this country, that the law of libel is too vague and uncertain, and that neither the common nor the statute law sufficiently define what constitutes a libel.

It may be of use to consider whether absolute and certain prohibitions are not excluded by the very nature of the subject matter, and whether, if such were imposed, they must not either consist in general and peremptory rules, which would encroach greatly on the freedom of communication, or in minute and specific ones, the particularity of which would subject them to the easiest evasions. The law may either totally prohibit all discussion on a particular and specific subject, or may go the length of tolerating all that can be

said or written upon it; but there is scarcely any question, either of general or individual interest, in respect of which total prohibition or entire toleration would not be prejudicial to the community. A total prohibition would, in most cases, if not in all, be inconsistent with the great principle of civil liberty, for a penal restraint, would be imposed to a greater extent than was necessary for the welfare of society; on the other hand, unrestrained license of communication would be liable to the greatest abuse, and open the door to great if not intolerable mischief.

Where it is on the one hand beneficial to society that freedom of communication should be tolerated to a great extent, but where, on the other, it would be highly inconvenient and mischievous to permit unbounded license to the abuse of that liberty, and, consequently, where a boundary is necessary, the establishment and preservation of a proper limit, must always be a work of nicety and difficulty. It is, however, exceedingly clear, that the line of interdiction cannot be regulated by any prohibition of particular sentiments or language. Injurious modes of expression are far too variable to admit of any precise rules or regulations, the laws which descend to particulars on such subjects, and which forbid specific expressions, otherwise than by way of example, are usually the work of early and inexperienced legislators, and cannot possibly be of any practical utility, subject, as they necessarily are, to the easiest evasions. Such offences, in truth, admit of no effectual description, except in respect of the *effects* which they produce, or which

they immediately *tend to produce*. Any attempt to enumerate, with a view to express, and particularly prohibit all the offensive means by which an ill disposed person might attempt to destroy the public sense of modesty and decency, would be impracticable and absurd; if it be necessary that such practices should be restrained by the municipal law, it is, if not impossible, at least difficult, that the offence should otherwise be described than generally by a prohibition to publish that which, being immodest and indecent, directly tends to corrupt and vitiate the morals of the public. It may be objected that any such general description is uncertain and indefinite. Be it so, what then? No other inference seems to result, than that human laws do not admit of perfection, and that no general definition can be framed, which shall be applicable to acts capable of infinite variety, with absolute certainty.

The publisher of a libel has no more reason to complain that the law does not precisely define what shall constitute a libel in every possible form which the offence may assume, than a party guilty of any mechanical and corporeal nuisance, has a right to object that the law does not define what precise extent of inconvenience he may inflict on others, without a violation of the law.

A man has a right to exercise his trade, but he has no right so to exercise it as to occasion mischief to the public in the neighbourhood of the place where it is carried on. To what extent may he carry it on without offence against the law, and without subjecting himself to criminal responsibility? Can the law define



this otherwise than by the general prohibition not to injure others; and must not every man, at his own peril, take care so to conduct himself and his affairs, that the public may not be injured? It would be as reasonable for one who carried on an offensive trade, to complain that the law had not defined how many cubical feet of foul and pestilential air emitted in a given time, would constitute a nuisance, as for a libeller to object that the law had not defined the precise quantum of noxious matter, which he should be allowed to send forth by the aid of the press, before he incurred any legal censure.

When the law says you are free, use your tongue, your pen, or even the press, at your discretion, this state of freedom must still be subject to the condition, that he who abuses his intellectual liberty and powers of offence to the injury of others, must be responsible for that abuse in the same manner as when he exerts his physical strength for such purposes. Liberty, divested of this condition, would be savage, not civilized liberty. But under such a condition, where liberty is the general rule, abuse of that liberty the exception, where so wide a range of free agency is permitted, it is for the agent to take care, at his peril, that he use not his liberty to the injury of others, either in their individual or aggregate capacities.

Where the modes of effecting mischief are of infinite variety, the illegality of acts must usually be defined by their actual consequences or immediate tendency, rather than by any detail of the means used. If a man were to drive another from his residence by setting up a pestilential manufactory in the neighbourhood, it

would be a strange defence to say, there is no law which prohibits me from consuming the particular drugs which I used. The law forbids the use of any in such a manner as to occasion such consequences; and when the law says that no man shall be allowed to degrade another from his place in society by deliberate and malicious publications, which expose him as the object of hatred, contempt, or ridicule, with what reason can the offender object that what may render a man odious or contemptible, is not sufficiently defined? It is by the effect or immediate tendency only that such an injury can be described (\*).

In the next place, is it essential that the communication be *false* as well as noxious?

The TRUTH of the imputation affords a decisive answer to an action for damages, for the plain reason, that a guilty party has no right to a character free from that imputation; and if he has no right to it, he cannot in justice recover damages for the loss of it; it is *damnum absque injuriâ* (a); but one great object of criminal animadversion is the preservation of public peace and good order, and those interests cannot be secured without restraining the publication, at least the deliberate publication, in print or by writing, of that which is true, as well as of that which is false; and therefore, though in principle the truth of an imputation be a decisive answer to

(\*) See the prohibitory definitions of the Code penal of France, *supra*, xxxiii.; of the Laws of Athens, xxxv.; of Rome, xxxi.; of Scotland, xxxiii.; of Spain, *infra*, cxliv. of England, *supra*, xxxi., *infra*, vol. 2, 210.

(a) *Supra*, xliv.

an action for damages, it is not an answer to the complaint on the part of the public, that the publication tends to disturb the peace of society (a).

The doubts which have been entertained on the question, whether, with a view to penal consequences, truth may constitute a libel, relate principally, if not exclusively, to libels which impute moral blame to individuals, and not to those which do not reflect upon any

(a) The law of England supplies many analogous distinctions. If A. has a right to a house, of which B., however, is in full possession, if A. were to enter violently with an armed force, and B. were to bring an action, he could recover no damages; for, however improper the mode of entry might be, yet it was no injury to B.'s possession, for he had no title to it; but, with respect to the public, it would be no defence to A. on an indictment for a breach of the peace, to allege that he was the owner, and that B.'s possession was wrongful, for it would be no answer to his having committed a breach of the peace; and though the real owner was entitled to the possession, he was bound to vindicate his right by legal and peaceable means. So if one were to beat or wound an outlaw, the latter could not recover damages, yet the act would be highly penal.

Although the rule that the truth of a libel cannot afford a defence to a criminal prosecution, as it may to an action to recover damages, seems to rest on clear and satisfactory grounds, yet much obscurity and confusion has prevailed on the subject, which may fairly be attributed to the doctrines of the civil law. The civil law made no distinction between the criminal and civil liability of a libeller. The consequence has been, that even in this country, where the doctrines of the civil law have been received with a great degree of jealousy, it was long before the point was completely settled, that the truth afforded a complete justification in the case of an action for written slander, any more than it did in the case of an indictment. See the observations of Lord Hardwicke, in *R. v. Roberts*, Sel. N. P. 986.

person in particular, but which are deemed criminal, from their tendency to endanger the security of society, by extirpating, or at least weakening, that sense of religious and moral obligation, upon which the happiness and well being of society so essentially depend. To assert that blasphemous, obscene, and criminal acts may be freely described and represented, because they are true, that is, because such things have been acted, would be too absurd a position to be advanced, or, if advanced, to need refutation.

Again, where an individual was subject to any personal defect or misfortune, or was unfortunate in any of his relations, if any one on that account were to expose him from day to day, and hold him out as the object of public contempt and ridicule, it could not be doubted that the truth, as was justly observed by a celebrated statesman *(b)*, would rather be an aggravation than an excuse, the world being too apt to consider men as contemptible for their misfortunes than as odious for their vices.

Suppose, then, that the alleged libel imputes some legal or moral delinquency to another, is then the truth the *veritas convicii*, as it has been termed by the civil law, to be admitted as a justification? Now, previous to making a few observations upon this point, as a mere question of legal policy, that is, of general expediency, into which it must ultimately be resolved, it may not be improper briefly to remark upon the ordinary popular objection made to the doctrine that truth may be a libel. It is seldom, that the public voice exclaims against a

(b) Mr. Fox, in the debate on the Libel Bill, vide *supra*, lxxvii.

law in the absence of all reason for complaint; whenever, therefore, that voice is heard, all thinking men will listen to it with attention, a benefit will be attained, either by amendment of the law, where the complaint is well founded, or by reconciling men's minds, where it can be shown that the complaint is erroneous, and that the law is just.

The popular objection to the doctrine that truth may be a libel, arises partly from the want of a full understanding of the grounds and extent of the rule, but chiefly and principally from a misapplication of an honourable and generous feeling in favour of truth.

The notion that the publication of that which is true ought not to be deemed criminal, is fallacious in a moral as well as in a legal point of view, it is, in effect, to assume that the means must sanctify the end, and that a good instrument cannot be perverted to unworthy and pernicious purposes. To assert that the truth may in all cases, and under all circumstances, be published, is a position as erroneous in morals as in law; truth, as well as falsehood, may be used as the instrument of creating misery, and where the object is immoral, the means by which it is attained, cannot be innocent. If a man were suddenly to communicate to one, in a weak state of health, some very afflicting and distressing intelligence, with intent that the suddenness of the shock should produce instant death; would not the executed purpose amount, in *foro conscientiae*, to murder, and would not the plea be frivolous and absurd, that the fact was true?

If the means, in a moral point of view, be regarded as material, the effect must be to aggravate the offence,

in consideration that truth has been perverted and made the instrument of perpetrating a crime.

The communication of the truth may not unfrequently constitute a most treacherous fraud, criminal in point of law, as well as morals; for, in some instances, it is essential that the law should impose silence, and that even under the obligation of an oath. In all such instances, the consideration that *the truth* is revealed, so far from affording any excuse, constitutes the crime.

With reference to one of the principal grounds on which the publication of a defamatory libel is to be regarded as an offence against the public, and without reference to any considerations of extrinsic policy, it seems to be sufficiently plain that the truth of the imputation ought not to be admitted as a defence, inasmuch as it is quite consistent with the mischief intended to be prevented.

As any direct solicitation to violate a law devised for public security, must needs be an offence against the law, every solicitation to break the public peace must in principle be penal. For as no laws can properly allow that to be effected by indirect means, the direct doing of which is prohibited, it follows, that it would be inconsistent that a law, which provided for public security, should permit its provisions to be in effect violated, by allowing the publication of defamatory imputations, which tended immediately to disturb that security. The law, therefore, which prohibits such offences, does so for one reason at least, which is wholly independent of the consideration, whether the imputation be in itself true or false.

If, then, without reference to any considerations of extrinsic policy, but looking only to the end and object of penal restraint, the truth of a defamatory communication ought not to constitute an exception in favour of the publisher, how stands the question on grounds of extrinsic policy?

On the one hand, to give a general and absolute license to publish that which was true concerning others, however defamatory in its nature and injurious in its consequences, and without any exception as to motive, even though the act were done with the illegal intention to provoke another to acts of aggression and violence, would necessarily and unavoidably occasion frequent interruptions of the public peace, personal conflicts, broils, and bloodshed, the natural issues of personal affronts. It is also obvious, that if the law were to tolerate the publication of criminal charges by one subject against another, under the condition that the accuser, when called on, should establish its truth in a court of justice, a new and anomalous tribunal would in effect be enacted of a dangerous and mischievous description. Suppose, that the accused defers to the jurisdiction, and puts forth his answer, which, in most cases, would be of a recriminatory nature, who are to be the arbiters? The public. And what means has this extraordinary jury of deciding on conflicting statements? what can be the result but mutual exasperation, if not violence? Let it even be supposed, that the delinquent is convicted in the judgment of the public, the penalty, no doubt, is severe—forfeiture of character, but even where such were the result, an evasion and default of justice would be occasioned by withdrawing the

cognizance of the crime from the ordinary legal tribunal where the offence would have been punished according to the wisdom of the law, and loss of reputation would have been a collateral but just and certain consequence.

It requires, however, little of observation or argument to show the inconvenience of permitting deliberate charges of specific crimes to be made otherwise than according to the ordinary course and forms of justice, provided by the law itself. It would, obviously, be inconsistent with the first principles of legal policy, that criminal accusations should be thus made before an incompetent and self-constructed court, to the neglect of the legal and appropriate tribunals. Even where such extrajudicial charges were true, the consequence would at least be delay, and usually an utter evasion of justice. Although these observations are not wholly applicable where the defamation does not consist in the imputation of a crime cognizable by the law—for justice, in such cases, is neither evaded nor delayed; yet, as far as regards the hardship to the individual, or the mischief to the public, the evil may be equally great.

It may be strongly urged that, to allow this would be in effect to extend the criminal code indefinitely, to make every breach of moral obligation, every sin against conscience, a crime of temporal cognizance. If general license were given for every one, as he pleased, to publish such delinquencies with impunity, so as he could afterwards prove them to be true, it is obvious, that every such justification would be equivalent to a judicial charge, the penalty forfeiture



of character, and thus every defamation, through the medium of a public newspaper or journal, might be but preparatory to a formal and judicial inquiry. To tolerate such a proceeding would, it is plain, be highly mischievous and inconvenient. To such an extent as is consistent with public good, it is for the law to define offences, and to punish offenders; but beyond this pale, must always exist an indefinite multitude of offences against morality, which the law does not visit, for the plain reason, that a greater degree of mischief and inconvenience would result to society from interfering with such delinquencies, than benefit from attempting to prevent them by the aid of penal censures. To allow such a justification in a criminal proceeding, would be to defeat the policy of the law in this respect. This argument may perhaps be met with the observation, that, notwithstanding the inconvenience which may result from the investigation of mere moral delinquencies, it has already been admitted, that such a justification ought to be allowed as a defence to the claim for damages in a civil proceeding. The answer is, that the cases are not parallel; the admitting such a justification, in the civil proceeding, is a matter of necessity, arising from the very nature of the claim to damages, and which it would be impossible to avoid, without violating the essential principle on which the civil remedy is founded, and allowing a delinquent to make a profit of his crimes. In the present instance, no such necessity or difficulty warrants an extension of the inconvenience; here the aggrieved party who seeks redress is the public, not the individual defamed; and the public is entitled to security, though the charge be

true, and though the individual may have no just title to damages.

In the next place, it may well be contended, that to permit such a justification as a defence for publishing an extrajudicial charge of a specific crime, would frequently be attended with positive injustice to the party defamed, and would open a door to great mischief and oppression.

How frequently must it happen that the self-constituted public accuser knows the facts but imperfectly, and, consequently, how great a temptation would the allowing such a justification afford to malicious and ill disposed persons to venture upon bold and confident charges, which, after all, could not be substantiated. Again, absolute and positive injustice would frequently be done in creating a general and public prejudice on the very subject to be afterwards tried, by allowing the whole proceeding to be, as it were, prefaced by an *ex parte* and highly coloured representation of the facts; circumstances might be stated in support of it, which would not be legal evidence on the trial, but which those appointed to decide, whose minds had been previously occupied and excited by an unfair representation, might not be able to dismiss from their consideration (*b*)

(*b*) And, therefore, the admitting such a justification would be wholly inconsistent with that wholesome principle recognized by the law of England, and also of Scotland, (*supra*, p. lxxxii.) which renders it illegal to publish *ex parte* statements of criminal proceedings, even though they have taken place before the proper tribunal, and upon the ground of which most important criminal trials in this country have been postponed, least the parties accused should suffer from undue pre-

But, suppose the prosecution to be instituted not by the party defamed, but by another, it is plain, that the greatest injustice might be done in proceeding to an investigation of the charge alleged, which so deeply involved his character and reputation, without affording him the opportunity of defence.

If this could be done, it would be in the power of any two ill disposed persons most effectually to ruin the character of a third, by the intervention of legal process. And even, if legal machinery could be devised for the purpose of making that third person a party to the proceeding, which absence or other circumstances would frequently render impracticable, it would be a most intolerable hardship that every man should thus in effect be liable to be subjected to the expense, trouble, and anxiety of a public defence and exculpation, and that, not with a view to any legal and beneficial consequence either to the public or to himself; for, if he were to be convicted, he could not upon that conviction be punished, neither would an acquittal afterwards be available to him, against a charge duly made before a competent tribunal.

But if unlimited license to publish whatever was contumelious and defamatory, so as it were true, would be attended with mischief to individuals and public disorder,

judice. To hold that the publication of an *ex parte* criminal proceeding before a magistrate is illegal, on account of the tendency of such a practice to divert the fair course of impartial justice, and yet to permit a mere unprivileged, unauthorized *ex parte* statement, not sanctioned by a judicial oath, or by any form or colour of legal proceeding, would be, to say the least, highly inconsistent.

what, on the other hand, would be the effect of a total prohibition to communicate what was defamatory, whether true or false? It can scarcely be doubted, that if it were necessary to adopt either the one or the other of these extremes, the former would be preferable. The resulting evil would be of a more limited extent, it would leave individuals exposed to insult, and society to frequent breaches of the peace; these, however, are consequences which cannot fairly be weighed against the mischiefs which would arise from weakening, if not destroying, one of the greatest moral securities by which society are protected,—the influence of public opinion.

But if the adoption of either of these extremes would be prejudicial, limits must be sought for, which, though they do not entirely exclude either of the opposite and conflicting mischiefs, reduce the aggregate amount.

One of the most prominent of the distinctions devised for this purpose, is that which is made between mere oral communications and such as are written.

Though the distinction between oral and written calumny partake of an artificial and arbitrary character; yet is it valuable, because it is plain and intelligible, and for this reason has frequently been adopted, for the purpose of defining the limits of criminal liability.

The restraining the criminal offence to written defamation is a provision which, whilst it leaves the ordinary communications incident to the daily business of life unfettered, at the same time guards against the mischiefs which would result from unlimited license, by subjecting to punishment all such as are guilty of the more deliberate, studied, and therefore more malicious

attacks upon character—the more dangerous and injurious, as being more permanent in their nature, and more capable of a wide and extensive circulation. This, therefore, is a mode of restraint, which, whilst it leaves open considerable channels for communications affecting character, yet visits all those attacks upon reputation to which the foregoing remarks on the necessity for penal restraint more particularly apply. To make mere oral communications penal, whenever they reflected on the characters of individuals, would be a heavy restraint on the ordinary intercourse of mankind, and would necessarily and unavoidably occasion much and vexatious litigation; on the other hand, the making written and defamatory charges penal, without regard to their truth or falsity, diminishes far less than might at first sight be expected, from the great securities for the discharge of legal as well as moral obligations, the love of reputation, and the fear of public censure and disgrace.

But, in the next place, any evil consequence which might otherwise result from subjecting written defamation, without regard to its truth or falsity, to penal censures, is best corrected by exempting largely from penal liability in all cases where the party acted with a fair and *bond fide* intention, with a view to a recognized legal object; and this, without regard to the truth or falsity of the communication in fact; for, in numerous instances, where the party acts honestly in pursuit of a legitimate object, it is far more consonant with the principles of natural justice and sound policy to make his criminality depend on his motive, rather than on the result of an investigation as to the truth of the matter published.

One man may violate the principles of honour and justice, and the dictates of his own conscience, though he publish that only which is strictly true; whilst another may act under the influence of strong moral feeling, in publishing what he believes to be true, but which turns out eventually to be false. If the confidential depositary of a secret were to betray his friend, from a motive of malice and revenge, he would undoubtedly stand in the first predicament; were a man, under a *bond fide* belief that another had committed a fraud to warn a friend, in confidence, against trusting that other, stating his reason, it would, provided he acted with reasonable caution, be contrary to natural justice and the ordinary principles of criminal jurisprudence, that he should be dealt with as a criminal, merely because he happened to be mistaken. The consideration, however, of the circumstances, which ought, when united with an honest intention to protect the party against criminal censures, belongs to another place; it is noticed here, merely for the purpose of showing that the punishment of written defamation, notwithstanding its truth, is capable of such modifications as may, to a great extent, secure the public from any injury which could arise from impeding those ordinary communications affecting reputation, which are of such great importance to society.

Another material consideration connected with the present subject, is, whether the truth of the defamatory imputation should not be allowed to be shown in mitigation of punishment, although unavailable as a complete defence, inasmuch as it is offensive to men's sense of natural justice, that one who published that only which was true, should undergo the

same measure of punishment as if he had in addition basely invented the slander. If, however, the party reflected on were not the prosecutor, it would be hard upon him to make his conduct the subject of public inquiry, where he had no means of defending himself by becoming a party to the inquiry; and even supposing that he were the prosecutor, and had an opportunity of meeting the charge, it would be highly inconvenient (c), that the guilt or innocence of the prosecutor, should thus be brought into question in such a collateral investigation, the more especially where he was charged with having committed an offence of which the ordinary criminal tribunals have cognizance. It remains, however, to be emphatically observed, that if the defendant, in such a case, is not to be admitted to show that what he published was true, it follows, as a strict and necessary consequence, that no greater punishment ought to be inflicted upon him, than would have been, had he been permitted to prove and had actually proved that the fact was true; for the truth is in principle excluded, because it is merely collateral and immaterial to the nature and extent of the offence, and if immaterial, no greater punishment ought to follow, than if the fact were true; it would obviously be unjust, first, to exclude a party from proof that what he published was true, and then to punish him with a greater degree of severity, as for publishing what was false, or at least not established as true.

2nd. Next, as to the *act* of the party, and the means of communication used.

(c) *Supra*, p. cxxvi.

In the civil proceeding to recover a compensation in damages, a publication of the slander is absolutely essential; without it, no damage can have been sustained in fact, and none can in principle be presumed. In respect of criminal animadversion, the case is different; it is a mere question of policy and expediency, whether the law shall interfere to prohibit, and in consequence to punish any act or dealing, in respect of a libel, anterior to an actual publication.

The first step is to conceive the mischievous and illegal matter of the libel, then to commit it to writing or print; it is by the act of publication that the offender, abandoning his *locus pœnitentiæ*, absolutely and conclusively inflicts the injury on society.

That the actual publication of that which is fraught with danger and mischief to society is to be regarded as penal, seems to be as clear a proposition, as it is, on the other hand, that the mere abstract intention to do mischief, unaccompanied by any act, ought not to be subjected to penal visitation (d); whether the

(d) A man's secret intentions, and even actions, are rather the subject of moral than of legal restraint, and they do not properly become the subject of penal visitation, until the necessity for coercion has been manifested by some overt act, tending to the prejudice of society.

Marsyas dreamt that he had cut Dyonysius's throat; Dyonysius put him to death, pretending that he would never have dreamt of such a thing by night, if he had not thought of it by day. This (says M. Montesquieu, b. 11, c. 12.) was a most tyrannical action, for though it had been the subject of his thoughts, yet he had made no attempt towards it. The laws do not take upon them to punish any other than overt acts.



intermediate acts of writing or printing a libel, with intent to publish, ought also be deemed criminal, is at least a fair question of legal policy: That such an act might properly be made penal, provided such a law were, on the whole, beneficial, seems to be manifest, for acts of forgery are usually considered to be consummated crimes of great magnitude, although they be done in secret and without subsequent voluntary publication. It is, however, to be apprehended, that to punish with strictness and effect, the mere writing or printing of a libel, would be attended with more of mischief than of benefit to the community. Unless means were devised for subjecting men's private closets to rigorous examination, founded on mere suspicion, such a law would be nugatory; it would rarely indeed be known that a man had composed and written a libel, unless he had himself in some way published or divulged it, and where that was the case, the law would cease to be necessary. On the other hand, the hardship and insecurity which would result to society from subjecting their private muniments and writings to examination, by police officers, would be a public inconvenience of the most intolerable description. And though no such power should be given to search on mere suspicion, yet would it frequently happen that the inferior ministers of the law would be ready, on many occasions, to run the risk of consequences in the expectation of detecting cause for accusation against suspected or obnoxious persons.

In the next place, do any limitations arise from the *means of communication* used? If penal restraint

were to be made strictly commensurate with the evil which calls for restraint, there would be no more reason for making penal responsibility than for making civil liability, to depend on the mere means of communication. For, it is plain, that the mode of communication cannot alter the vicious and mischievous nature of the matter communicated, though it may considerably affect the extent and duration of the mischief.

If a written incitement to an evil act tend to produce mischief to the public, so also must an oral one; and, therefore, if the former is on that account to be deemed criminal, so ought the latter. The two modes may indeed differ as to the extent of the mischief likely to be occasioned; the former is capable of being widely circulated, and for a length of time; the effect of the latter is likely to be more local and more transitory; this, however, is but casual and contingent; an inflammatory and seditious speech, addressed to a multitude on an occasion of great excitement, may produce effects far more mischievous and lasting than if the same speech were written or printed, and communicated to but a few. Contumelious and insulting expressions applied to a party in his presence and before a large assembly may be infinitely more injurious and provocative than if the same had been written and sent to him. At all events the difference of mode cannot, in point of principle, alter the criminal quality of the act, but merely affords room for a distinction in admeasuring the punishment.

When, however, considerations of extrinsic policy are taken into the account, and allowed to operate in

restraint of criminal liability, it is obvious that a distinction, founded on the mode of publication, including, within its scope, such modes as by their capability and facility of diffusion, and permanency, must ordinarily be considered as the more dangerous, as by printing or writing, and excluding such as are merely oral, may well consist with general convenience.

Some observations have already been made, with a view to show that, as far as the civil remedy is concerned, there is no sound distinction between oral and written slander; in reference, however, to penal censures, there are several reasons for confining the penalties in respect of personal defamation to written publications. In the first place, to extend the offence to oral defamation generally, would be inconvenient, because it would give rise to many vexatious prosecutions, and would create far too large a restraint on communications involving character. In the next place, the proof of an offence committed by the writing and publishing of illegal matter, is far more definite and satisfactory than where the offence is merely oral, when so much depends on tone and manner, the situation of the speaker, the circumstances under which he spoke, the understanding and memory of the hearers. On this account it is that the municipal laws of different countries so frequently found a distinction between what is written and that which is merely spoken (e).

(e) See Montesquieu's *Spirit of Laws*, b. 12, c. 12. Hence it is, that, according to the law of England, mere words spoken do not constitute an overt act of treason, (*infra*, vol. 2, p. 167.)

This relaxation, however, founded, as it is, on a principle of convenience, cannot properly be extended beyond those communications which usually occur in the ordinary intercourse of society, in which the character and reputation of particular members of that society must necessarily and frequently be involved. It would be highly inconvenient that men's tongues should be fettered on such occasions, by the perpetual apprehension of criminal prosecutions. It is plain, that no direct solicitation to violate the law can by possibility fall within any principle of expediency, so as to derive protection from it.

The law of England has not only made a distinction in respect of the *means* of communication, but has also adopted the word *libel* as a particular and technical term, by which communications of an immoral or illegal tendency, made by means of writings, pictures, or signs, are distinguished from those which are merely oral (*f*).

This distinction and the grounds of it, will more properly be adverted to hereafter, when the provi-

(*f*) 4 Comm. 150. This definition, though perhaps sufficiently proximate for all practical and useful purposes, does not precisely agree with the ordinary sense and meaning of the word, for it would include an express written solicitation to commit a crime, which does not, perhaps, in strictness, fall within the ordinary notion of a libel; yet, inasmuch as the very essence of a libel consists in its tendency to produce some public or private mischief, such a solicitation conveyed in writing, seems properly to fall within the meaning of the term.

sions of the law of England on the subject are discussed.

3rdly, It is next to be considered how far the *motive* of the party, and the *occasion* of the publication are material, either to constitute or repel the conclusion of guilt, where a publication has been effected of noxious and illegal tendency.

It seems, on the one hand, that a mere wicked and mischievous intention, unless it be conjoined with some publication of noxious and illegal matter, cannot constitute an offence against mere municipal laws; in other words, that mere abstract intention is not punishable by a human tribunal. If a man, intending to publish a most atrocious libel, were by mistake to deliver the gospel instead of the book in which the libel was contained, though, in a moral point of view, his guilt would be just the same as if he had published the libel, yet he would have committed no crime against the law, unless that law took cognizance of mere abstract intention, unaccompanied by any definite criminal act. On the other hand, it appears to be equally manifest, that where any act is by the law defined to be illegal and criminal, every one is punishable who voluntarily does the prohibited act, without some legal justification or excuse, furnished by the occasion and circumstances, and without regard to his real motive and intention. To hold that a man should be absolved from penal responsibility, merely because his motives were kind, benevolent, and philanthropic, would be to set the private opinion and conscience of every one above the law to the utter subversion of the law.

For the same reason, it is obvious, that mere abstract intention and motive, where the act is voluntary, cannot, without reference to the *occasion* and circumstances of the communication, constitute any justification or excuse which the law can safely recognize.

The intention of the publisher, in reference to criminal, as well as civil liability, is capable of a threefold distinction; he may, in the first place, be actuated by a malicious and malignant intention to effect the particular mischief to which the means which he uses tend; or, on the other hand, his object may be benevolent and laudable; or, lastly, he may be indifferent as to consequences, and act purely from some collateral motive. But mere intention in the abstract, and without reference to circumstances which supply a justification, recognized by the law, cannot supply a test of exemption from criminal, any more than from civil liability.

A man must, in respect of criminal, as well as remedial consequences, be presumed to contemplate and intend the natural consequences of his own act; if, therefore, the act be calculated for the production of evil consequences, he must be taken to have intended them; or it may, with greater simplicity, be stated, that the wilful doing of any prohibited act, tending to public injury, is, in the absence of any lawful excuse, in itself criminal, legal malice being in all such cases a mere formal inference of law.

And it seems to be clear in principle, that mere innocence of intention, so long as the act is voluntary and designed, in the absence of circumstances which amount to a legal excuse, cannot exempt the party even from

criminal liability. Every man must be taken to know the law; to hold the contrary, would be to confer a premium on ignorance, which would afford a defence for every possible transgression of the law (*g*).

4thly. In the next place, in reference to the *criminal*, as well as the civil branch of the subject, the *occasion* and *circumstances* of the communication may furnish either an *absolute* and peremptory bar to criminal responsibility, or a *qualified* one dependent on the particular motive and intention with which the party was actuated in making such communication.

In the first place, it is in some instances a matter of public policy, arising from the *occasion* of making the communication, wholly to exempt the party from all penal consequences, at least from the ordinary penalties annexed to defamatory communications. The same principle of expediency, which operates to the exemption of a legislator, judge, or witness, from actions for slander, applies to the question of exemption from penal liability.

Thus, if in the course of a legal investigation, a witness should make a deposition greatly injurious to the character of another, and which would, if published under other circumstances, be criminal; yet it would obviously be impolitic and inconvenient to permit a penal prosecution to be maintained against the witness, in respect of his deposition, founded on a mere suggestion,

(*g*) Ignorance of the law excuses no man; not that all men know the law, but because it is an excuse every man will make, and no man can tell how to confute him.—Selden.

that his intention was malicious; for it would necessarily be a great hindrance to such inquiries, if the motives of witnesses could be afterwards brought in question. Though his motive in becoming a witness might be most malicious and immoral, his testimony might be true and essential to the purposes of justice. Corruption on the part of a judge, or perjury on that of a witness, must necessarily be crimes of great magnitude under every system of laws; these, however, are very distinct and different offences, and are not connected with the present subject.

In the next place, the occasion and circumstances of the communication may supply a *qualified* defence, dependent on the actual intention to injure. The constituting a large and extensive barrier, for the legal protection and immunity of those who act *bona fide* and sincerely, according to the occasion and circumstances in which they are placed, is not only just, in a moral point of view, and advisable as a measure of policy, but is absolutely necessary for the purposes of civil society. Were the mere probable effect and tendency of a publication to be the criterion of guilt, without reference to the real motive of the author and the occasion and circumstances under which he acted, the rule would be far too extensive for the convenience of mankind, and the evil resulting from the prohibition would greatly outweigh the opposite advantages to be derived from it.

It is indeed very possible that a party, actuated by the very best intentions, may propagate erroneous no-



## PRELIMINARY DISCOURSE.

tions, but so long as he urges those opinions *bonâ fide*, believing them to be just, and intending to do good, his errors are not likely to prevail against the better sense and judgment of mankind to a very serious and prejudicial extent; and the contingent and casual publication of erroneous opinions cannot be placed in competition with the splendid advantages which flow from permitting full and fair discussion on every subject of interest to mankind, as connected with religion, politics, philosophy, and morals.

The security of the public, in this respect, is amply provided for by distinguishing between that which is published, with a sincere and honest, though unsuccessful intention to do right, and malicious attempts to injure society in general, or individuals in particular, by profane, blasphemous, seditious, immodest, or defamatory communications.

This general principle embraces not only all communications made on subjects of public interest, but also those which affect the characters of private persons, provided they be made in the discharge of any legal, or even moral duty, and in a manner suited to the occasion. Here the boundaries of criminal as well as civil liability seem to be identical.

In all such cases, though the tendency may be of an injurious nature, it is a question whether the party was really actuated by a good and honest intention, as suggested by the occasion and circumstances under which he published, or whether he made use of that occa-

sion as a cloak for carrying an injurious and malicious design into effect. The real intention of the party is the proper test of criminality, and legal is commensurate with moral delinquency.

Here a question of considerable importance occurs: though the truth of a slanderous charge may be no justification, yet in those instances where malice in fact is the test of criminality, where the question is, whether the publisher acted sincerely, or merely maliciously, and not with reference to the occasion, ought it not to be admitted, at all events, as collateral evidence to shew the true state of his mind. Thus, suppose that A. writes a letter to B., stating the latter to have been guilty of disgraceful conduct, and that the defence is, that the letter was written for the purpose of admonition and advice, not with a view to injure or offend B., but in order to amend and reclaim him. In such a case, the question would be, as to the sincerity of A.; if he were sincere, it would be contrary to sound policy and natural justice to punish him as a criminal; if he assumed the mask of friendship, in order that he might wound with impunity, he would deserve, for his hypocrisy, a higher degree of punishment. Now, as the issue would, in such a case, be on the mere fact of sincerity, it is manifest, that if the prosecutor could show that the imputation was false in fact, and that B. *knew* it to be false, this would at once be decisive to show that he did not act *bond fide*, and although, on the other hand, proof that the facts were true, or that B. believed them to be

true, would not be absolutely decisive as to his sincerity of intention, yet still there can be no doubt as to the materiality of such evidence.

In such cases, one of three courses must necessarily be adopted, either, first, to assume the *falsity* of the imputation; or, secondly, to assume its *truth*, (or at least not to assume its falsity;) or, thirdly, to admit evidence of the fact. The first of these must at once be rejected, so inconsistent would it be with reason and natural justice, to subject any one to *punishment* on the *assumption* of a fact, without permitting him to disprove it. Each of the other alternatives would be attended with its peculiar difficulties, it would be highly inconvenient to try a collateral charge against the prosecutor, or it may be a stranger, far more heinous, than the principal one against the defendant. On the other hand, were the truth to be presumed, or at least the falsity not assumed, a malicious libeller might be acquitted, of whose malice the most decisive proof might have been adduced. The latter, however, would probably be the less inconvenient consequence of the two, for many of the most weighty objections against admitting the truth of a personal and defamatory charge to afford ground of justification or excuse, would also apply to the exclusion of proof of the fact as collateral evidence. It is also to be recollected, that, after all, the truth or falsity of the charge would not be the real question, and would be material, so far only as it tended to show the real intention of the party who made it; and, therefore, even admitting the fact to be true, still the prosecutor would be at liberty to

show that the defendant did not act on any belief of the truth, or even if he did, that he was actuated by a malicious intention to injure or offend, and not with a fair and honest intention to effect a beneficial object; and, on the other hand, the defendant would be at liberty, even though he admitted the imputation to be false, to show that he believed it to be true, and that he acted on that supposition with a *bonâ fide* intention (â).

(2) The law of England, it will be seen, on the trial of an information or indictment for publishing a defamatory libel reflecting on an individual, excludes evidence of the truth of the contents, though it be offered merely with a view to prove or disprove the malice of the publisher.

It has been strongly urged, (see the *Edinburgh Review*, for the year 1816,) that in thus rejecting evidence of the truth, injustice is done; and it must be admitted at once that to exclude such proof, and, at the same time, to raise any presumption that the charge was false, because it had not been proved to be true, would be productive of gross injustice to a defendant in such a prosecution. On the other hand, although to exclude proof that the charge was false, and, which is still more material, that the defendant *knew* it to be false, would be to exclude the most cogent evidence of malice, the consequence would be less repugnant to men's sense of natural justice, inasmuch as it is preferable to err on the side of mercy, especially as the defect might frequently be supplied by other evidence, so seldom does it happen that the same malicious feeling, which is strong enough to cause a party to invent a deliberate fiction, does not also betray itself by collateral indications. The effect of such an exclusion is also diminished by the consideration that the objection is applicable only to that intermediate, though large class of cases, where *actual malice* is the proper test of guilt; and that against the inconvenience which no doubt must result from excluding such evidence in this class of cases, are to be set off those opposite inconveniences, already adverted to, which would arise from the admitting such evidence: the necessity for inquiring into the most serious

The degree of punishment to be inflicted, in respect of a noxious and illegal communication, must necessarily depend much on the species and degree of injury

and complicated criminal charges in a collateral proceeding of far less importance; the constituting a tribunal for indirectly trying moral offences, of which the law itself takes no cognizance; the danger to be apprehended to the public peace from permitting insults to be offered where the truth can be proved, without restraint, and thus driving men to avenge such insults by violence; and last, but not least, the hardship which would be occasioned to individuals in permitting their conduct and reputation to be put in hazard, it may be collusively, by proceedings to which they are not parties. It has been urged that the same kind of hardship may arise on a justification in a civil action; but there from the nature of the case, the danger is much limited by the consideration that the plaintiff cannot collusively implicate the character of a third person without injuring his own. If A. were to publish that B. had been guilty of adultery with the wife of C., and on an action for damages brought by C. and his wife, A. were to justify, alleging that the fact was true, the character of B. would no doubt be implicated in the result, though he had no means of becoming a party to the proceeding; but in such a case there would be little probability of collusion between A. and the husband for the purpose of defaming B., when it is considered that the object could not be accomplished except by means of a verdict which recorded the dishonour of C. and the infamy of his wife. In the civil proceeding, therefore, little of abuse or inconvenience can arise from an implication of a third person in a justification of this nature, whilst in a prosecution to be instituted by a stranger, no such restraint on the abuse would operate.

It is true that, as the law now stands, the defamed or injured party is usually the prosecutor, but it by no means follows that prosecutions would be so limited if such a justification were to be permitted, and a recent instance (*R. v. Burdett*, 4 B. and A. 314.) is sufficient to show that the characters of third persons may be deeply implicated in prosecutions to which they are strangers.

It has further been urged that, in the criminal proceeding, the real ob-

likely to result from the act. It is obvious that, in many instances, it ought to be regulated in analogy to corresponding penal provisions contained in the same code.

ject of legal interference is the protection of the defamed party, and that the injury to the public is but a legal fiction. Now that one main ground of penal infliction in such cases, recognized by the law of England, is the protection of individuals, may readily be admitted, but this is not the only one; another and equally important object, as may be collected from the language and decisions of the courts, is the preservation of the public peace, and this may clearly be inferred from the consideration that a publication of a libel is penal, though it be strictly confined to the party defamed; this would be unnecessary if the law regarded merely the injured credit of the individual, but is absolutely necessary, if security to the public be also the object of the law. The same conclusion is to be drawn from the consideration that the law punishes libels on the dead as well as on the living, out of the just apprehension that otherwise the family of the deceased would visit the insult as a personal affront to themselves; and one reason, and that a forcible one, for punishing libels, even on the subject of religion, is the consideration that to revile a man's religion cannot but be regarded as an indirect affront to himself. Were the object of civil and criminal visitation in respect of personal defamation by means of libels identical, it is evident that one and the same process ought to serve for both, and that in England as in Scotland, the prosecutor should be allowed to proceed at once for amends to the individual, and also for the infliction of a fine or imprisonment, if indeed any penal censure ought to follow where the object is simply the protection of the individual, and where the awarding damages would probably be sufficient for the purpose.

But it is urged that the practice of the Court of King's Bench in refusing a criminal information where the alleged libel is true, shows that the protection is of a personal nature. It must, however, be recollected that in granting or refusing criminal informations in case of libels, the Court of King's Bench exercises a discretionary power, acting on principles which are peculiar to that proceeding, and that the

When such an offence amounts to the *crimen læsæ majestatis*, the offender is of course subject to the penalties of treason. Where the offence consists in a solici-

practice, in the instance of a criminal information for a libel, is not only peculiar to that proceeding but irreconcilable with the ordinary principles of jurisprudence on which the law of libel in England is founded. The general rule is, that the truth or falsity of a libel is immaterial, whilst in this instance it is made the first and essential object of preliminary inquiry,—of an inquiry conducted in a mode foreign to the ordinary forms of criminal justice, not by evidence before a jury, but by affidavits. Such a mode of investigation, at all times unsatisfactory, is the more so where the defendant, though the alleged libel be perfectly true, has no means of compelling those who know the truth to establish it by their affidavits; and yet, when the information has been granted, he is excluded from giving evidence of the truth, although the information was granted only on the assumption that the statement was false, a circumstance which necessarily tends to raise an unfavourable prejudice against him on the trial. Notwithstanding such considerations, the result is far more beneficial than might have been expected, or than possibly could have happened, had the practice been general. The truth is, that although the Court of King's Bench is open to all applicants for criminal informations, yet in cases of libel it is seldom resorted to but by persons of rank or wealth. The proceeding by information for a libel is a kind of intermediate course between treating the insult as an affair of honour, and the more vulgar and plebeian course of presenting a bill of indictment at the sessions or assizes. The libelled party has an opportunity of exculpating himself by means of a denial of the imputation on his conduct and character in the most public manner, and under a solemn sanction; his adversary is the more ready to make concession where, from the form of the proceeding, his character for courage is not implicated, and where the truth of the fact having been solemnly denied, an opportunity is afforded for explanation, concession, or apology. And thus it happens that a course of proceeding which is to a certain extent inconsistent with general principles, is in its limited application rendered beneficial by parti-

tation to commit some other substantive offence, which is in consequence perpetrated, then it partakes of the nature of that offence, and is, in effect, but a means of its accomplishment. But where the criminal object is not accomplished, in consequence of such an illegal solicitation, there is room for a distinction in favour of the offender, to allow him the benefit of a *locus pœnitentiæ* (k).

cular considerations. Men cannot be moulded and adapted to the laws: the laws must be accommodated to men, not such as they ought to be, but such as they are; and if even a portion of a considerable and powerful class of the community can be induced to submit themselves to the law instead of resorting to violence, this is an advantage to society which it would be unwise to sacrifice for the mere sake of legal symmetry; and the practice may well be permitted, without establishing any general rule, even although it be irreconcilable with the ordinary and general principles on which the law proceeds.

(k) Some, it is well known, have supposed that the publication of a defamatory satire was, by the law of the Twelve Tables, punishable with death. Montesquieu, *Sp. of Laws*. The authority for this is a quotation by St. Augustine (*De Civitate Dei*, lib. 2. c. 9.) from Cicero *de Republicâ*, lib. 4. c. 10. In that passage, Scipio Africanus, discoursing of the licentiousness of the Greek comedies, speaks thus:—*Apud Græcos fuit etiam lege concessum, ut quod vellet comœdia, de quo vellet nominatim diceret. Nostre contra xii. tabulæ cum perpaucas res capite sanxissent in his hanc quoque sanciendam putaverunt: Si quis occentavisset (actitavisset) sive carmen condidisset quod infumiam faceret flagitiumve alteri.* Præclare, judiciis enim magistratuum disceptationibus legitimis propositam vitam, non poetarum ingeniis habere debemus, nec probum audire nisi eâ lege ut respondere liceat et judicio defendere.

It would be difficult, however, in the absence of stronger and more direct authority, to accede to this position that the Decemviral Code punished this offence capitally, although certainly the *pœna capitis* did



At all events, the punishment ought never to exceed that which would by law have been inflicted, had the offence, to the accomplishment of which the solicitation or

not always mean the punishment of death. For, in the first place, the authority is weakened by the consideration that St. Augustine himself does not profess to communicate the exact words even of Cicero. Secondly, the immediate and shocking severity of a law which visited the authors of calumnious verses, such as would, in many instances, merit contempt rather than legal penalties, and prove far more fatal to the reputation of the author than to the honour of the object of his attack, affords intrinsic evidence sufficient to excite strong suspicion and doubt upon the subject, in the absence of the most direct and certain evidence, of the existence of such a law. Such doubts acquire additional force from a consideration of the sources from which the Decemviral Code was compiled.

The Athenian laws were those which were principally consulted by the framers of the Twelve Tables. Liv. iii. 31. Gell. Noct. Att. xx. i. but they afforded no prototype for such a law. The laws of Solon, it is well known, punished calumniators by subjecting them merely to pecuniary fines. (1 Pet. Leg. Attic. Lycias in Theomnestem.) It is not probable, therefore, *à priori*, that the framers of the new laws would have visited the offence with so incommensurate and vindictive a punishment. It has, indeed, been suggested that this was a part of the *Leges Regiæ*, which was retained in the Twelve Tables. There seems, however, to be no trace of any such prior law; and, from the very passage, as quoted from St. Augustine, it may be inferred, that the law of the Twelve Tables contained the first restraint of that license to defame, which had been abused by the Greek comedians. *Apud Græcos fuit etiam lege concessum ut quod vellet Comœdia de quo vellet nominatim diceret, Nostræ contra duodecim tabulæ, &c.* In the absence of any historical evidence of the previous existence of such a law as part of the *Leges Regiæ*, it is improbable that any such existed in that rude and illiterate æra of the Roman history, previous to the formation of the Twelve Tables, when few were likely to offend by reading, still fewer by writing, satires.

libel tends, been actually committed. This observation ought, however, to be confined to those instances where the offence consists in the attempt to provoke or incite

That the Romans, however, were in the habit of making and reciting verses when the law of the Twelve Tables was enacted, and that those laws contained sanctions to restrain the abuse of that practice, clearly appears. Thus Cicero, (*Tuscul. Disp. lib. 4. c. 2.*) ‘*Gravissimus auctor in originibus dixit Cato, morem apud majores hunc epularum fuisse, ut deinceps qui accubarent canerent ad tibiam clarorum virorum laudes atque virtutes. Ex quo perspicuum est, et cantus tum fuisse rescriptos vocum sonis, et carmina, quamquam id quidem etiam XII. Tabulæ declarant, condi jam tum solitum esse carmen; quod ne liceret fieri ad alterius injuriam, lege sanxerunt.*’ It follows, that so far was Cicero from knowing or supposing that any law existed anterior to those of the Twelve Tables, which punished the author of defamatory verse, that he even cites the law of the Twelve Tables to show that songs were composed at all in that remote age.

Did the Decemviri create such a law for political purposes, and in order to support an usurped authority? M. Montesquieu, the author, at least the supporter, of this suggestion, seems to have eagerly admitted the existence of the law for the purpose of building a theory upon it. He attempts to show, that, of the three great forms of government, the aristocratical is that which visits libellers with most severity, and cites this law of the Decemvirs by way of illustration. To confute such a theory would be a departure from our present subject. It is strikingly in opposition to the description which Tacitus gives with so much force and feeling, of the *ultimum in servitute* suffered by the Romans under the tyranny of Domitian. But if there be a difficulty in accounting for the origin of such a law, there would be a still greater one in accounting for the approbation which the laws received, as well from the Roman people as from their historians. The punishing of those who had libelled illustrious persons, with capital penalties, under pretence of a violation of the *Lex læsæ Majestatis*, was accounted a tyrannical and sanguinary measure in the times of Sylla, Augustus, and Tiberius; what then would have been thought of such a

some particular individual to the commission of an offence. For it may receive a great aggravation from its tendency to produce a widely extended mischief from its

penalty for defamation in an early age of the Republic? How is it possible to suppose that so severe and tyrannical a law would have been favourably received by the people, or afterwards commended by their great historians? — (See Tacitus, *Annal* iii. 27; Livy, *lib.* i.)

On the other hand, in addition to the weakness of the proof which can be adduced as to the existence of such a law as part of the Twelve Tables, and the internal evidence which the supposed law affords to disprove itself, it may be observed, that the laws of the Twelve Tables did, in fact, prohibit all personal injuries under a pecuniary penalty.

*Si injuriam faxit alteri viginti quinque æris pœnæ sunt.*

In the language of the Roman jurists, earlier as well as later, the general term *injuria* included a wrong by writing or speaking, as well as by personal violence. Was then a libeller, by the same law, punishable by a moderate pecuniary fine, as a compensation to the party injured, whilst his life was forfeited to the state? Or, if the private wrong did not fall within the scope of the term *injuria*, was actual or personal violence punished by a fine only, whilst the slightest injury to reputation, by a song, or by writing, to be visited by capital punishment? Again, there is great reason for supposing that, by the laws of the Twelve Tables, the author of the *Carmen malum* was subjected, not to capital punishment, but to corporal castigation by beating.

The principle of retaliation which was recognised by that Code, was obviously inapplicable in the case of a malignant and satirical poem. To allow retaliation would be but an illusory vindication to an honourable but illiterate man, who had suffered from an offensive and provoking satire; and it is not impossible, that the subjecting the body of the offender to the actual cudgel of the sufferer, might be deemed the approximate substitute for the use of the invisible and intellectual, but rude, powerful, and more galling lash of satire, the application of which, in return, was impossible. Be this as it may, certain it is,

influence on numbers. As in the case where an offender is guilty of printing and circulating irreligious, seditious, or immoral publications amongst society in

that the *supplicium fustuarium* was a punishment inflicted upon libelers by the ancient Roman law, and as many able commentators have, with great reason supposed, by the law of the Twelve Tables. Horace, in his well-known lines, in reference to the *carmen famosum*, not only specifies the mode of punishment, but seems to cite the law which inflicted it as the first which was made in restraint of libels :

Quinetiam lex

Pœnaque lata, malo quæ nollet carmine quemquam

Describi : vertere modum, *formidine fustis*

Ad bene dicendum delectandumque redacti.

Epist. lib. 11. ep. 1. v. 152.

That the *pana fustuaria* was inflicted on one class, at least, of libelers, is generally admitted by the unanimous voices of legal as well as poetical commentators. And it is not easy to ascribe this mode of punishment to any other period than that of the Twelve Tables. Cicero, as well in the passage quoted by St. Augustine, from the *De Republicâ*, as in that cited from the *Tusculan Disputations*, expressly refers to the law of the Twelve Tables as the first which applied restraint to the *carmen infame*. The punishment, therefore, to which the *formido fustis* of Horace refers, could not well be earlier than the law of the Twelve Tables ; neither could it well be later, for the context shows that the poet was describing, as matter of history, the earliest check imposed by the law on the publication of defamatory verses.

Any later law inflicting such a punishment, must, in all probability, have been enacted previously to the Porcian law, which took away from the magistrate the power of inflicting corporal punishment on the person of a Roman citizen : there is, however, no trace to be found of the abrogation of the capital punishment, and the substitution of the *supplicium fustuarium*, either in that interval or at any other time ; nor does it appear that capital punishment was ever inflicted under this supposed law of the Twelve Tables. Some, indeed, have doubted

general, at the hazard of tainting and corrupting the principles of the great body of society.

It seems to be very doubtful, whether, in point of

whether the punishment by beating was known to the Decemviral laws, (Hotomann, c. 77.; Dirksen on the Twelve Tables, 511.) and therefore infer that the law cited by Horace is of later date. This, however, seems to be an erroneous assumption. See Cicero de Legibus; Augustin, de Civ. Dei, Lib. 21. c. 11. Octo pœnarum genera in legibus continentur, damnum, vincula, *verbera*, talio, ignominia, exilium, mors, servitus: and see Dirksen's Fragments of the Laws of the Twelve Tables, ad tab. 8. fr. 14.

Again, allusion seems to be made to the same law in the De Arte Poeticâ:

Lex est accepta, Chorusque

Turpiter obtulit, sublato jure nocendi.

It is very difficult, indeed, to suppose that Horace and Cicero did not allude to the same law, when each was speaking of the abuses which had arisen from unrestricted license, and of the legal restraints which those abuses had occasioned. Nor is it easy to suppose that Horace, in the passages cited, referred to different laws. If, however, the law of the Twelve Tables visited this offence with fustigation, it is impossible to suppose that the punishment was capital. It has indeed been suggested that Cicero, in the passage cited from St. Augustine, asserted that the offence was capital by the law of the Twelve Tables, because it was a punishment which *might* produce death, although that was a consequence not only not intended, but prohibited, by the law.—See Heineccius, Ant. Rom. Ad. Inst. Lib. iv. tit. iv. s. 2.

It is, however, difficult to suppose that Cicero, who himself, in a passage already cited, enumerated distinctly the different modes of punishment authorised and practised by the law, and in which he mentions *Verbera* as distinct from all which could be considered capital, such as Mors Exilium, &c. should confound the quality and degree of a higher species of punishment with the effect and possible consequences of a distinct and inferior one.—Be this as it may, it is certain that many critics and able commentators have main-

principle, any penalty by fine or imprisonment ought to be inflicted, in respect of personal defamation, where the injured individual can obtain complete satisfaction

tained the opinion that the law of the Twelve Tables punished the offence, not capitally, but by fustigation. — *Fustuarium supplicium constitutum erat in auctorem carminum infamum.* Porphyrio, ad. Horat.—Heineccius. Ant. Rom. Lib. iv. tit. iv. s. 2. *Lege xii. tabularum cautum est ut fustibus feriretur qui publice inveheretur.*—Cornutus ad. Pers. Sat. 1. *Si quis carmen occentassit quod alteri flagitium faxit, fuste cæditor.*—Charondas, S. 55. Dirksen ad. xii. Tab. 515. *Si quis pipulo occentassit carmenve condidisset quod infamiam faxit flagitiumve alteri, fuste ferito.*—Festus.

After all, it is matter rather of speculative curiosity than of practical utility, to inquire whether the decemvirs did or did not annex capital punishment to this offence; if they did, the instance must stand as a solitary and anomalous memorial of barbarous ignorance and cruelty in the annals of jurisprudence; one without a prototype in former, or a parallel in succeeding generations. History, however, records no instance in which this law, if it existed, was ever put in force, and in no succeeding age of the Roman republic or empire, not even under the worst seasons of imperial tyranny and oppression, was the offence of libel *without distinction* made capital, though certainly the punishment of death was annexed in after times to several modifications of the crime. Notwithstanding the charge which M. Montesquieu has urged against Sylla, of having augmented the punishment against libellers and satirists, yet it seems that by his laws they were in general subject merely to pecuniary fines, at least no punishment is mentioned except one.—See Mathæus, ad. lib. 47. Dig. tit. 4, s. 4. The Cornelian law annexed to the offence a penalty of a remarkable nature, which has given rise to some doubt: “*Si quis librum ad infamiam alicujus pertinentem scripserit, composuerit, ediderit, dolove malo fecerit quo quid eorum fieret, etiam si alterius nomine ediderit, vel sine nomine de eâ re injuriarum agere licere et si condemnatus sit qui id fecit intestabilem ex lege esse jubere.*” This law, according to some, was meant to deprive a libeller of the right of making a testament. The real mean-

in damages. It would obviously be an inconvenient and unwarranted restraint on natural liberty to impose a sentence of imprisonment where ample amends could

ing seems to have been, that he should be incapable of giving his testimony in a court of justice; an appropriate disqualification, founded probably on the presumption that a man who by a false and *anonymous* charge, whether of a judicial or extrajudicial nature, had deliberately attempted to destroy the reputation of another, could not be deemed worthy of credit as a witness.

The fact that Sylla, (Cic. Fam. Epist. 3. 11.) Augustus, and Tiberius, punished those who were guilty of writing libels on illustrious persons with death, under the strained pretence of a violation of the *Lex lesæ Majestatis*, is strong to show that no general law then existed which warranted capital punishment. It is much more probable that they would have enforced or revived an obsolete law than have incurred the odium of such a manifest abuse of a different law. Tiberius, under the pretence that Agrippina, his daughter in law, had indirectly calumniated him, by refusing to eat apples which he knew she did not dare to taste, and which he offered that her refusal might afford a pretext for complaint, and also by her seeking refuge from his monstrous cruelty at the statue of Augustus, caused her to be *beaten* for the supposed calumnies, with such violence as to force out one of her eyes. Not content with such savage barbarity, and jealous least a more merciful fate should deprive him of his unhappy victim, he endeavoured to prevent a voluntary death, by forcing food into her mouth, and even pursued his abominable revenge beyond the grave, by heaping insult on her memory. And yet had this monster the audacity to claim commendation for his mercies.

Quondam vero inter cœnam porrecta a se poma, gustare non ausam etiam vocare desiit, simulans se veneni crimine arcessi, cum præstructum utrumque consulto esset, ut et ipse tentandi gratiâ offerret, et illa quasi certissimum exitium caveret. Novissime *calumniatus* modo ad statuum Augusti modo ad exercitus confugere velle, Pandatariam relegavit, *conviciantique oculum per centurionem verberibus excussit*. Rursus mori inediâ destinanti, per vim ore diducto, infulciri cibum jussit. Sed et perseverantem atque ita absumptam eriminosissimè insectatus

be made to the injured party by awarding damages. The point at which penal visitation ought to begin to attach, either in the absence of reparation to the indivi-

est, cum diem quoque natalem ejus inter nefastos referendum suassisset. Imputavit etiam quod non laqueo strangulatam in Gemonias abjecerit : *proque tali clementiâ* interponi decretum passus est, quo sibi gratiâ agerentur et Capitolino Jovi donum ex auro sacraretur.—Sueton. Tiber. c. 54.

By a *senatus consultum*, it was afterwards prohibited, ne quis in alterius injuriam ad statuas principum confugeret imaginesve eorum portaret, qui secus faceret in vincula mitteretur.

In the next place, by a *Senatus consultum*, as well as by several imperial constitutions, the author or publisher of the *Libellus Famosus* was liable to capital punishment. This severe penalty was evidently founded on the principle of the *Lex Talionis*, which called for the infliction of death upon one who had by a false and capital, though secret judicial charge, deliberately practised against the life of another. The severity of such a law may be accounted for, even though its policy should not be justified, by the consideration, that in those times of cruelty and oppression for which they were calculated, secret accusations of the most heinous and improbable offences were in effect but the instruments used by legal assassins; under the reign of a despotic emperor, suspicion was equivalent to proof; trial to condemnation.—(Gibbon's *Decline*, &c.) But in order to bring an offender within the penalty of the *Libellus Famosus*, it was, it seems, essential that the charge should be a *secret* one of a *capital offence*; this seems clearly to appear from a very cursory view of the laws themselves. Thus the first constitution of the Theodosian code (which contains a series of enactments relating to such libels,) enacts as follows:—*Si quando famosi libelli reperiantur, nullas exinde calumnias patiantur, quorum de factis vel nominibus aliquid continebunt, sed scriptionis auctor potius reperiatur, et repertus cum omni vigore cogatur, his de rebus quas proponendas credidit comprobare, &c.*

Again, in the second, it is observed, “ Qui accusandi fiduciam gerit



dual, or in addition to it, is, where either civil reparation cannot be enforced, on account of the difficulty of making the wrongdoer responsible, or where the com-

oportet comprobare nec *occultare* quæ sciverit quoniam predicabilis erit ad dictationem publicam merito perventurus."

Again, in the third, "Famosis libellis fides habenda non est, nec super his ad nostram scientiam referendum, cum eosdem libellos flammis protinus conducatur aboleri quorum *auctor nullus* existit."

Again, by the fourth, "Famosa scriptio libellorum quæ *nomine accusatoris caret* minimè examinanda est, sed penitus abolenda, nam qui accusationis promotione confidat, liberâ potius intentione, quam captiosâ et *occultâ* conscriptione, alterius debet *vitam* in iudicium devocare."

By the fifth, "Non igitur *vita* cujusquam non dignitas concussa his machinis vacillabit, nam omnes hujusmodi libellos (scil. *famosos*) concremari decernimus."

Again, by the eighth, "Jampridem adversus calumnias firmissima sunt comparata præsidia. Nullus igitur calumniam metuat. Contumelia vero quæ *caput* alterius contra juris ordinem pulsatur, depressa nostris legibus jaceat, intercidat furor famosorum libellorum."

By the ninth, which was an edict of the Emperors Valentinian and Valens, afterwards imported into the Digest, "Si quis famosum libellum sive domo sive in publico, vel in quocumque alio loco ignarus repererit, aut corrumpat prius quam alter inveniatur, aut nulli confiteatur inventum. Si vero non statim easdem chartulas corruperit vel igne consumpserit sed earum vim manifestaverit, Sciatur se quod auctorem hujusmodi delicti *capitali* sententiæ subjugandum. Sanè si quis devotionis suæ ac salutis publicæ custodiam gerat, *nomen suum profiteatur*, et quæ per famosum libellum persequenda putaverit ore proprio edicat, ita ut absque ullâ trepidatione accedat, sciens quidem quod si adser-tionibus suis veri fides fuerit opitulata, laudem maximam et premium a nostrâ clementiâ consequetur, sin vero minimè vera ostenderit capitali pœnâ plectetur."

Sylla, as has already been observed, decreed that to declaim against public officers should be deemed a violation of the *Lex Iulia Majestatis*.

selling civil amends, is not sufficient to protect the interests of the public. Thus, according to the law of England, the open taking and using the property of

Augustus Cæsar, by a forced and unwarranted construction, extended the penalties of treason to those who libelled illustrious characters.—Tiberius followed his example, and in his reign Cremutius Cordus, charged with having called Cassius the last of the Romans, escaped a public execution merely by voluntary starvation. In later times of the empire, the punishment of libellers was increased or relaxed according to the temper and disposition of the reigning monarch. In the place of a moderate, uniform, and permanent administration of justice upon just and firm principles, was substituted either excess of severity or of clemency, according to the pleasure of the reigning autocrat. For though the errors were not usually on the side of mercy, yet the Emperor Theodosius seems to have carried his generosity to a somewhat romantic extent, in avowing an intention to pardon all maledictions against himself, or the times in which he lived.—“*Si quis modestiæ nescius, et pudoris ignarus, improbo petulantique maledicto nomina nostra credididerit lacescenda ac temulentia turbulenta obtrektor temporum fuerit, eum poenâ nolumus subjugari, neque durum aliquid neque asperum sustinere, quoniam id si ex levitate processerit contemnendum est, si ex insania miseratione dignissimum, si ab injuria remittendum.*”

As to the penalties denounced by the Mosaic law, see above, p. xi; by the laws of Greece, *ib.* p. xxxiv; of France, *ib.* p. xxxii; of England, *infra* vol. ii.

By the law of Spain, he who libels another by a written defamatory libel, (*libelos infamatorios*) incurs the same punishment that the party libelled would incur if the imputation were true. And in case the libel be in *writing*, the libeller is not exempted from punishment although the libellous matter be *true*. But in the case of oral slander, the party who uttered the words, will be admitted to prove that they were true, if the public were interested in its being known; but if the public be not interested, he is not admitted to such proof, and consequently incurs the punishment, although the slander be true, because no one has a right to insult another; and it is always injurious and unjust to re-

another, is merely the subject of a civil action to obtain compensation in damages, and does not amount to a public crime; but where the taking is under circumstances of secrecy or force, then the civil action being inadequate to the protection of society, the act becomes criminal, even in some cases, to a capital extent (*l*).

The effect of permitting an offender to be visited criminally, as well as civilly, in respect of the same personal injury by defamation, may frequently be to place both proceedings in hazard; a court or jury would in all cases be inclined to diminish the amount of civil damages, where they supposed that the defendant would, in addition to the exaction of those damages, be further subjected to a criminal prosecution and to fine, or even imprisonment, whilst, after the payment of damages, it may be, inadequate to the real injury, a court or jury would strongly lean against a criminal conviction.

proach others with their defects or faults, however true they may be. Johnson's Institutes of the Civil Law of Spain, p. 277. By the same law, he who libels another with stigmatising or infamous language (*palabra denigrativa*) shall pay 1,200 maravedis, and shall be obliged to recant (*desdecere*) if he is not an *hidalgo*.—*ib*. He who libels his father must pay 600 maravedis; 400 to the injured party, and 200 to the accuser.—*ib*.

(*l*) Although the law of England allows the party libelled to proceed, at the same time, both civilly for damages and by indictment; yet in practice it very rarely happens that the party proceeds in both ways. And where an application is made for a criminal information for a libel, the ordinary condition of granting it is, that the applicant shall not bring an action. Would it not be desirable, that in all cases the party should be restricted to one mode of proceeding, and in adopting either, should be considered as having made his election?

The author had purposed to conclude these preliminary observations with a brief historical sketch of the English law, as connected with the subject. Neither time nor space at present permit such a detail, but it may be proper to add a few general remarks in reference to the law of England, addressed principally to the English law student.

Even to the student it is scarcely necessary to observe, that though his immediate object may be to master the details and technicalities of a particular branch of the law, he ought ever to keep in view another object of great importance, and still greater interest,—the acquisition of a more intimate and scientific knowledge of the principles on which the legal system is founded, of its peculiar genius, merits, and defects.

It is further to be observed, that there is no other branch of our own law, of equal importance and complexity, which depends so little as this does on positive legislative enactments, and, consequently, so much on precedent and common law principles.

That the common law system, which consists in applying to every new combination of circumstances, rules of law derivable from legal principles and judicial precedents, possesses great and splendid advantages, can no more be doubted, than that it is subject also to considerable defects.

The proofs of the latter position are far too manifest and too strong to be overborne, even by the authority of Lord Coke himself, consummate master as he was of all the treasures of common law learning.

Nature's fancied impatience of a vacuum was not more

complete than, according to Lord Coke, is the abhorrence of the common law from all that is inconvenient or unreasonable.

Nothing (he says) is lawful which is inconvenient; and, again, "the law, that is the perfection of reason, cannot suffer any thing that is inconvenient."

That Lord Coke should both feel and express that unbounded admiration of the common law, which was probably one main foundation of his excellence in that branch of learning, and which the very consciousness of that excellence in turn served to augment, cannot be matter either of regret or surprise (*m*); that such commendation ought to be received with many grains of allowance, and that excessive panegyric, however agreeable to national prejudices, is injurious in proportion as

(*m*) This great master of the common law of his time, was never weary of reiterating his commendation of the law; he says, 1 Ins. 97. b. "an argument drawn from an inconvenience, is forcible in law, as *hath been observed before, and shall be often hereafter, nihil quod est inconueniens est licitum.* And the law, that is the *perfection* of reason, cannot suffer any thing that is inconvenient."

Again, he observes, "*Nihil quod est contra rationem est licitum.* And this is another strong argument in law, *nihil quod est contra rationem est licitum*; for reason is the life of the law, nay, the common law itself is *nothing else but reason*, which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason, for *nemo nascitur artifex.* This legal reason, *est summa ratio.* And therefore, if all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law in England is; because by many successions of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection for the government of this realme, as the

it retards improvement, will not at the present day be disputed.

The common law, therefore, according to Lord Coke, is perfect reason, but to set up the reason of the best and the wisest of men, as the standard of what is lawful, would be in fact to make individual discretion and reason the rule of right, which would be to dispense with all pretensions to certainty. What is meant, then, as indeed Lord Coke himself expresses it, is not "every man's natural reason," but artificial reason, derived from study and experience of the law. But as the natural reason of one man differs from that of another, so not only will one man derive a conclusion different from that of another, from the same legal data or precedents, but also in the application of the same legal or artificial rule to the same circumstances. Artificial or legal reason, therefore, so far from admitting of that unity, certainty, and perfection, to which natural reason cannot pretend, is subject to the like, and even in some respects greater uncertainty; it necessarily depends, in the first place, on the exercise of natural reason, and is, therefore, liable to a double miscarriage, either in the failure to extract the true artificial or legal reason; or, 2ndly, in the failure to apply that reason properly, when once extracted; hence it is that, in the course of common law, many such miscarriages occur.

For the great and broad principles of natural justice,

old rule may be justly verified of it; *neminem oportet esse sapientiores legibus*, no man out of his own private reason ought to be wiser than the law, which is the *perfection* of reason."

there is little necessity for resorting to precedent or example; they are written in plain characters in the minds of all rational men. It is in cases where such principles conflict with each other, or with extrinsic considerations of convenience, or where opposite suggestions of mere convenience or inconvenience are at variance with each other, that different minds will attain to very inconsistent, or even opposite conclusions.

The natural tendency of a system of unwritten law must be, in process of time, to induce an inconvenient degree of uncertainty arising from a struggle between precedent and principle, wherever they differ or are supposed to differ.

To overturn precedents by applying a rule of artificial policy and convenience inconsistent with them, would be to weaken the authority of precedent, one of the great pillars of the law; to adhere with servility to precedents, merely as such, would be to sacrifice to mere precedent, those general principles of policy and convenience which constitute the very foundation of the system.

It is, however, no part of the author's intention, on the present occasion, to pursue these remarks. Enough may already have been said on the subject, to excite the attention of the student, and induce him to attend to the operation and effect of the common law principles, maxims, and practice on this branch of English jurisprudence.

In some instances, and those important ones, it will be found that rules have been established, on the mere foundation of precedent, as contradistinguished from any considerations of reason or convenience. Thus, so

lately as the year 1812, the important question (n) was allowed to be mooted, whether the remedy by a civil action for damages ought to be allowed in respect of any calumnious expressions, when published in writing, which would not have been actionable had they been merely spoken. And upon that occasion the court, in pronouncing judgment, avowed that they were bound by mere precedent to establish a rule which was not supported by reason or convenience (o).

(n) It is probable that the extension of the remedy by action to matters, when written, which, when spoken, would not have been actionable, was borrowed from the civil law, though it may be doubtful at what precise period the rule was imported into the law of England. Notwithstanding the celebrated *Nolumus Leges Angliæ mutari*, the lawyers of former times had it in their power, without avowing it, to introduce and establish many of the rules and maxims, and even much of the practice of the civil law. Bracton, professing to treat of the law of England, copies largely from the Institutes and Digest, and with so little anxiety to disguise the matter, as even to speak of the *Prætor's* authority and of the *Actio Legis Aquiliæ & injuriarum*. In treating of offences, in respect of which the offender was then liable in the same proceeding, both to a criminal and civil action, he says, *Facta puniuntur.... scripta, ut falsa et libelli famosi*. Again, he says, *Actio competit ei qui contumeliam vel injuriam passus est*.

(o) *Thorley v. Lord Kerry*, 4 Taunt. 355, and see the observation of Best, C. J. in the *Archbishop of Tuam v. Robeson*, 5 Bingh. 21. This branch of the law is subject to one defect, which is particularly to be deprecated. Whilst such ample provision is made for affording a remedy by action, in respect of every slander which can possibly affect a party in his profession, office, or means of living, so that the lowest mechanic has his remedy in damages, though none can be actually proved, against any one who detracts from his skill or ability, and no one can falsely say that a publican sells sour beer, but he is responsible, yet can no action be maintained in respect of any oral imputation on the character or conduc



Notwithstanding the difficulties which are incident to the common law system, the courts have endeavoured to protect individuals from injurious and calumnious imputations, without, at the same time, encouraging a spirit of vexatious litigation, and fettering the ordinary and daily intercourse of society with legal trammels. A remedy is afforded against all malicious attacks, which immediately tend to endanger the liberty of an individual, by imputing the commission of a crime, or to injure him in his profession, office, trade, or means of livelihood. On the other hand, no one is liable to an action for damages, so long as he has published that which is true, nor even although he has mistakenly and inadvertently published what turns out to be false, provided his error was an honest one, and the communication was fairly warranted by the occasion of making it.

The penal provisions of the law are founded on a few just and simple principles of criminal jurisprudence, by no means peculiar to this branch of the law. Here, as in other instances, freedom of action is the general rule, restraint the exception.

As the law inflicts punishment on any one who, without authority, imprisons or beats another, so is it penal, to assault or attack the character or credit of an individual, by written or printed libels, wantonly and maliciously published (*p*).

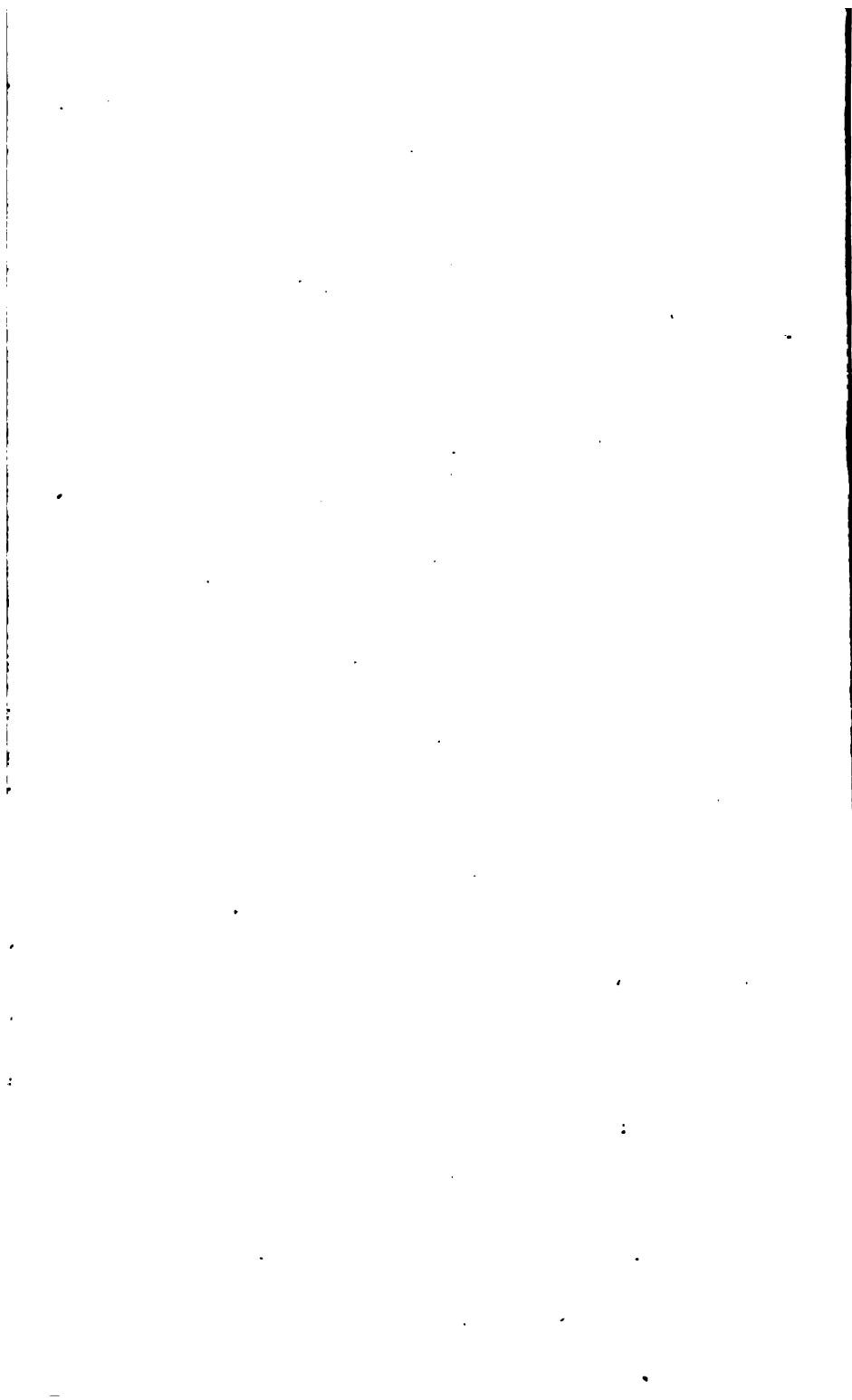
of the most virtuous woman, however groundless and malicious in its origin, or destructive in its consequences, unless some *actual temporal damage* can be proved.

(*p*) In confirmation of the general position, that the law of England, in respect of libel, is but an application of the general principles of penal jurisprudence to the particular subject matter, it may be re-

Penal liability, in this, as in other instances, attaches only to an abuse of liberty, to the injury of the public. A man may publish what he will on all subjects of general interest; but if he wilfully and maliciously publish that which is offensive and pernicious, he commits the nuisance, as in any other cases, at the just peril of penal censures.

It may safely be asserted, that this portion of English jurisprudence is founded on just and equitable principles, that it is characterized by a spirit of moderation and liberality suited to the temper of the people and genius of a constitution, which has, in a great measure, confided to the people themselves, in their capacity of jurors, the guardianship of their own liberties, and that whilst no civilized nation has ever enjoyed a wider range of intellectual freedom, its value is enhanced by the reflection that the enjoyment of the privilege of free discussion is not merely consistent with public safety, but is greatly conducive to the moral and political interests of the community.

marked, that the only general and the most important statute relating to the subject was passed for the express purpose of removing an anomaly which had been introduced with respect to trials on prosecutions for libel, and placing them on the same footing with those for other misdemeanors.



## CHAPTER I.

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THE provisions of the law of England in respect of communications, whether they be oral or written (*a*), which are injurious to individuals or to society at large, are those:—

1st. Of a civil nature, which give a remedy in damages to an injured individual; or

2ndly. Of a criminal nature, which are devised for the security of the public.

The subject will first be considered in reference to the civil remedy, concerning which it will be convenient to inquire:—

1st. Under what limits the law awards a remedy in damages for such an injury.

2nd. The means of obtaining that remedy.

In general an action is maintainable in respect of every wrong or privation of a legal right.

(*a*) It is necessary to observe, that, in order to avoid repetition, under the term *written*, are meant to be included all communications of whatever description, by writing, printing, painting, or signs, as contradistinguished from those which are merely oral.

For it would be nugatory to pronounce that any man had a right, without affording him the means of enforcing or defending it.

By the same law, every man has a right not only to his life, limbs, health, and personal security, but also to his good name and reputation; that is, he has a legal claim to be protected against false and wilful communications, whether oral or written, made to his prejudice or damage.

The law which recognises this right also limits its extent.

This is done by defining what communications shall be regarded as *substantively injurious*, and therefore actionable, though no special damage or loss can be shown.

And by leaving all other cases to the operation of the general principle of law, that "Where a man has a temporal loss or damage by the wrong of another, he shall have an action on the case to be repaired in damages (*b*)."

For this general rule embraces all cases, where any *special damage* is immediately occasioned by a false communication, of noxious tendency.

It may be collected, from the definitions of text-writers and the decisions of our courts, that, in general, an action lies to recover damages in respect of any false and *malicious* communica-

(b) 1 Com. Dig. action on the case, Bac. Ab. tit. Action, B.

tion, whether oral or written, to the damage of another, in law or in fact.

It may, perhaps, be more properly stated, that an action lies in respect of any wilful communication, oral or written, to the damage of another, in law or in fact, made without lawful justification or excuse.

It will be seen that these descriptions do not differ in substance, and that if *malice* be used as a descriptive term, it must be understood of malice in a technical and artificial sense, as merely signifying the absence of any legal justification or excuse (c).

(c) See the objections on this subject in the Preliminary Discourse. The ordinary legal term by which an injury of the above description is denoted, is *Slander*; but to this term, different meanings have been attached. Its origin is the same with that of the word *Scandal*, being derived immediately from the old French word *Esclaunderie*, and mediately from the Greek *Σκάνδαλον*, offendiculum in viâ positum, a military instrument, used for the annoying of cavalry, by wounding the feet of the horses, and that again from *Σκάζω*, claudico. There is, therefore, nothing in the origin of the term, which should confine its figurative application to *oral*, as contradistinguished from *written* communications, although it has frequently been used in the former limited sense.

Sir W. Blackstone, in his enumeration, (vol. 3. p. 123.,) of injuries, states, that those affecting a man's reputation or good name, are, first, by malicious, scandalous, and slanderous words, tending to his damage and derogation; as if a man maliciously and falsely utter any slander or false tale of another,

It is, however, obvious, that, whatever be the brief, general, and comprehensive form of words, used to describe the outlines of such an injury, a discussion of its different branches must quickly resolve itself into a consideration ;—

&c. And the same learned writer, in subsequently describing the injury to a man's reputation by means of a libel, omits the term *slander* altogether.

But if not in common acceptation, yet in legal understanding at least, the word is used to embrace written as well as oral defamation; thus, in Bacon's Abridgment, (tit. Slander,) *slander* is (defined to be) the publishing of words, in *writing* or by speaking, by means of which the person to whom they relate becomes liable to suffer some corporal punishment, or to sustain some damage.

In Comyns's Digest, (tit. Action upon the Case for Defamation, A.,) it is laid down, that "An action on the case lies for defamation, if a man defame another by slanderous words." And afterwards the following hypothetical illustration is cited as an authority:—"If a man, by letter, *write* slander of another to a third person." 1 And. 119.

Again, in Buller's Nisi Prius, 3. *slander* is defined to be "the defaming a man in his reputation, by speaking or *writing* words which affect his life, office, or trade; or which tend to his loss of preferment in marriage or service, or to his disinheritance, or which occasion any other particular damage."

And, therefore, however desirable it might be to possess some legal term, which should signify *oral* defamation only, yet it would be inconvenient so to limit the term *slander* itself, in opposition to the authorities to the contrary; the term will, therefore, be used in this treatise in its general sense, as comprehending *written* as well as *oral* defamation.

It seems also to admit of some doubt, whether the term

1st. Of the nature, quality, and consequences, of the matter communicated.

2ndly. Of the act of communication.

3rdly. Of the intention with which that communication was made.

*slander* necessarily imports the *falsity* of the matter communicated. According to Lord Camden, 2 Wils. 301, "If the words be true, they are *no slander*, and may be justified."

Sir W. Blackstone, in his description of the injury, (above cited,) uses the terms *false tale*, in context with, or rather in explanation of the word *slander*. And, in a subsequent passage, he observes, that "If the defendant be able to justify and prove the words to be true, no action will lie, even though special damage hath ensued, for then it is *no slander* or *false tale*." Bl. Comm. vol. 3. p. 125.

Again, the defamation of a peer is ordinarily termed *scandalum magnatum*; and it seems to be clear, that the statutes which regard this offence relate to *false* reports only: the expressions are *false news* or tales, horrible and *false* lies, and other such *false* things. See below, tit. *Scandalum Magnatum*.

And it is observeable that, in those statutes, the word *slander* itself is used, to denote rather the scandal, or offence occasioned by false news or tales, than the false news itself; for they specify false news, &c., whereby discord, or occasion of discord, or *slander*, may grow between the king and his people. See

The term itself, therefore, seems to imply the *falsity* of the communication; however this may be, as it is clear, in point of law, that no action is maintainable where the communication is true, it is of little importance whether the term *false* be used as descriptive of the right to damages, or the truth be enumerated as a ground of legal justification, the result and effect must be the same. It may, however, according to legal ana-



4thly. The occasion and circumstances of the communication, as affording matter of justification or excuse.

First, then, as to the nature, quality, and consequences of the communication.

logy, be more correct to consider the truth of a communication to be ground of collateral justification or excuse.

A man has either, by his own exertions, acquired a good character, or, at all events, the law will presume that he has one; to the enjoyment of this he has the same natural and absolute right that he has to the enjoyment of his liberty, health, or property; and any one who curtails his enjoyment of that reputation is, *primâ facie*, as much a wrong-doer, as if he deprived him of his liberty or property. It is true, that he forfeits his right to the enjoyment of a good reputation by misconduct, which shows that he no longer deserves it; but he may also forfeit his right to liberty by misconduct,—if, for instance, he commits a felony, any one has a right to arrest him: but, in the one instance as well as the other, in the case of privation of character as well as of liberty, the right to take away the reputation or liberty of another is founded on a collateral fact, namely, his misconduct, and depends partly, at least, upon considerations of external legal policy and convenience. A man may have acquired a good character, as well as a good fortune, by unfair and fraudulent means, yet, being possessed of it, no stranger has a right, in law or in morals, to deprive him of either, unless it be for the attainment of some legal object, under the sanction of a law founded on principles of public convenience and utility.

The law of England recognises this doctrine, in requiring that the truth of the imputation, if it be relied on by way of defence; shall be pleaded specially, by way of justification, (vide *infra*, tit. Justification;) just as a defendant, in case of tres-

It is, in the first place, essential to the claim to damages, that the imputation should be *false*; for as, in point of natural justice and equity, no one can possibly have any claim or

pass to the person or property of another, must, in his defence, plead those collateral facts specially, which show that he was justified in what he did. This proves that the law regards such a justification as collateral. Were the falsity originally essential to the plaintiff's right to damages, then, although the proof of the truth would be incumbent on the defendant, for the plaintiff would not be put to prove a negative, more especially where the law presumed the affirmative, yet the defendant would be entitled to prove the truth of the charge under the general issue, for he would thereby show that an essential ingredient in the plaintiff's claim to recover was wanting, and that he could not have been guilty of the injury imputed. For these reasons, it may be convenient to treat the truth of the alleged slander as a collateral ground of defence, within the words *without lawful justification or excuse*.

It may, however, be further remarked, that if, *ex vi termini*, the word *slander* imports a *false* charge, written slander cannot be used as co-extensive with *libel*, even in the application of the latter term to mere personal written defamation; for the term *libel* clearly extends to such written defamation, whether it be true or false.

Again, the term *libel*, (a mere diminutive from *liber*,) has by no means been used uniformly and constantly to convey the same meaning, even among lawyers, in its application to defamatory and illegal communications.

In Bacon's Abridgment, tit. Libel, it is defined to be "a *malicious* defamation, expressed either in printing or writing, or by signs, pictures, &c., tending either to blacken the memory of one who is dead, or the reputation of one who is

title to a false character, so also would it be contrary to the principles of public policy and convenience, to permit a man to make gain of the

alive, and thereby exposing him to public hatred, contempt, and ridicule."

In Comyns's Digest, tit. Libel, A., a *libel* is defined to be a contumely or reproach, published to the defamation of the government, of a magistrate, or of a private person, and it may be in writing, 5 Co. 125. b. As if a man publishes a rhyme, epigram, or other writing, made to the defamation of another; or it may be without writing, (Salk. 418.) as if he makes a picture in an ignominious manner, or any ignominious sign, to the reproach of another, 5 Co. 125. b.

Hawkins, in his Pleas of the Crown, treating of *libel*, observes, "In a strict sense, it (a libel) is taken, for a malicious defamation, expressed either in print or writing, in a larger sense, the notion of libel may be applied to any defamation whatsoever, expressed either by signs or pictures, as by affixing up a gallows at a man's door, or by painting him in a shameful and ignominious manner."

Sir W. Blackstone, in treating of libels as the means of civil injury, observes, "A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like, which set him in an odious or ridiculous light, and thereby diminish his reputation." (3 Comm. 125.)

In treating of the subject in a criminal point of view, he says, "Of a nature very similar to challenges are libels, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency."

Of the definitions above referred to, none but those of Sir W. Blackstone comprehend all that may be included under the term *libel*; and considering the offence in its relation as

loss of that reputation which he had forfeited by his misconduct (*d*).

But as the law always presumes in favour of innocence, and therefore does not require a plaintiff to prove the falsity of the alleged calumny, and, on the contrary, imposes the burthen of proving the affirmative on the defendant; the truth of the supposed slander is, in effect, a ground of justification, which must be substantiated by the defendant, consequently the decisions on this point will be more properly considered hereafter, in remarking upon those justifications which are recognized by the law.

In the next place, the *consequence* of the slander must be to occasion some injury or loss to the plaintiff, either in *law* or in *fact*.

As, in many instances, the immediate tendency of malicious slander is, to produce great and irreparable mischief to the party whose character is assailed, though none can be proved, or can be proved in time, so as to save the sufferer from great loss, or even absolute ruin, the law, in particular instances, on grounds of the wisest policy, considers the very publication of parti-

well to the public as to individuals, libels may not inconveniently or improperly be defined to be "any writings, pictures, or other signs, which immediately tend to injure the character of an individual, or to occasion mischief to the public."

(*d*) See Preliminary Discourse, p. xxxiv.

cular slander to be injurious, and to confer a substantive right of action, though no especial loss or damage can be proved.

In the first place, then, in what cases does the communication amount to a damage in law? Or, in other words, when is the slander actionable without proof of any special damage?

The general rule is, that "where the natural consequence of the words is a damage; as if they import a charge of having been guilty of a crime, or of having a contagious distemper, or if they are prejudicial to a person in an office, or to a person of a profession or trade, they are in themselves actionable; in other cases, the party who brings an action for words, must show the damage which he has received from them" (e).

It appears, that an action may be maintained *without proof of special damage* in the following cases.

Where a person is charged with the commission of a *crime*.

Where an infectious disorder is imputed.

Where the *imputation affects him in his office, profession, or business*.

Where the matter charged tends to his *disinherison*.

Where the slander is propagated by printing, writing, pictures, or signs.

In cases of *scandalum magnatum*.

It will be considered, under each of these divisions, by what rules the extent of the action in each case is limited, and the reasons upon which they are founded.

1st. Where a person is charged with the commission of a crime.

Here it may be considered,

1st. *What must be the nature of the offence imputed.*

2ndly. *In what manner and terms it must be imputed.*

1st. What must be the nature of the offence imputed.

The action for scandalous words, though of high antiquity (*f*), was formerly so little resorted to, that between the first and fifth years of the reign of Edward the Third, not more than three instances occurred (*g*).

From the commencement of the reign of Elizabeth, such actions, especially for words containing an imputation of crime, began to multiply with great rapidity, a circumstance chiefly attributable to the increasing encouragement which they met with in our courts. No settled

(*f*) By the st. 13 Ed. 1. it is recited, that in cause of defamation, it hath been granted already that it shall be tried in a spiritual court, where *money is not demanded*.

(*g*) According to Coke, C. J. 3 Bulst. 167.

rule, ascertaining their limits, seems however to have been established at any early period, and the mass of conflicting decisions to be met with in the books, exhibits convincing marks of the precarious and fluctuating principles on which they were grounded.

A struggle between two opposite inconveniences, seems to have created this wavering in the minds of the judges. The fear of encouraging a spirit of idle and vexatious (*h*) litigation, by affording too great a facility to this species of action, was contrasted with the mischief resulting to the public peace from refusing legal redress to the party whose reputation had been slandered, every day's experience teaching, that the remedy, denied by our courts, would most surely be pursued by acts of personal violence. Accordingly it appears, that as the former or latter of these considerations preponderated, a more rigid or relaxed rule of decision was adopted by the judges (*i*).

In *Edward's* case(*k*), the defendant had charged

(*h*) 6 Mod. 24.

(*i*) Out of 200 successive cases, taken at random in Croke's Reports of cases in the reign of Elizabeth, 15 consist of actions for words,—a proportion somewhat greater than that of one in fourteen. If, upon the average, it be supposed that each individual case of the two classes occupied the same time, it will follow, that one day out of every fourteen, must have been devoted by the court to this fruitful subject of litigation.

(*k*) Cro. Eliz. 6.

the plaintiff with having attempted to burn the defendant's house ; and the court were of opinion, that the charge was actionable, assigning, generally, as the reason, that, "*by such speech the plaintiff's good name is impaired.*"

In *Stanhope v. Blith* (l), the words were, "M. Stanhope hath but one manor, and that he hath gotten by swearing and forswearing ;" and Wray, C. J. said, "that though slanders and false imputations are to be suppressed, because many times "*a verbis ad verbera perventum est ;*" yet he said, "that the judges had resolved, that actions for scandals should not be maintained by any strained construction or argument, nor any favour given to support them ; forasmuch as in in these days they more abound than in times past, and the intemperance and malice of men increase, *et malitiis hominum est obviandum*: and in our books *actiones pro scandalis sunt rarissimæ* ; and such as are brought are for words of *eminent slanders and of great import.*" In *Smale v. Hammon* (m), the words were, "thou wert forsworn, and I can prove it." Upon motion in arrest of judgment, Williams, J. said, "this rule is to be observed as touching words, which are actionable ; that is to say *where the words spoken do tend to the infamy, discredit, or*

(l) 4 Co. 15.

(m) 1 Bulst. 40.



*disgrace of the party, there the words shall be actionable."* And the rule was affirmed by the court.

Yet so little was this rule regarded, that in the very next case which occurred, where the words were (n) "thou wert in gaol for robbing such an one on the highway," the court differed in opinion; and Fenner, J. held, that if one saith of another, "thou art as very a thief as any in Warwick Gaol," *none being then in prison*, the words would not be actionable, but otherwise *had a felon been there at the time*.

In *Sir Harbert Crofts v. Brown* (o), the words were, "Sir H. C. keepeth men to rob me." And upon giving judgment for the defendant, Coke, C. J. said, "We will not give more favour unto actions on the case for words, than of necessity we ought to do, where the words are not apparently scandalous, these actions being now too frequent."

In the early part of the reign of Queen Anne, Chief Justice Holt (p) observed, *that "it was not worth while to be learned on the subject, but whenever any words tended to take away a man's reputation, he would encourage actions for them, because so doing would much contribute to the*

(n) Bulst. 40.

(o) 3 Bulst. 167.

(p) *Baker v. Pierce*, Holt, k. 654. 6 Mod. 24. S. C.

*preservation of the peace."* And in another report (q) of the same case, he is stated to have said, "I remember a story, told by Mr. Justice Twisden, of a man that had brought an action for scandalous words spoken of him; and upon a motion made in arrest of judgment, the judgment was arrested, and the plaintiff being in the court at the time, said, that if he had thought he should not have recovered, he would have cut the defendant's throat."

Yet the same learned judge, in a case (r) somewhat subsequent to the former, is reported to have said, that "to make words actionable in themselves, it is necessary *to charge some scandalous crime by them.*" In the case of *Ogden and Turner* (s), the defendant said to the plaintiff, "thou art one of those that stole my Lord Shaftesbury's deer." The court held, "that words to be of themselves actionable, without regard to the person or foreign help, must *either endanger the party's life, or subject him to infamous punishment; and that it is not sufficient that the party may be fined and imprisoned:* for that, if any one be found guilty of any common trespass, he shall be fined and imprisoned, and

(q) Lord Ray. 959.

(r) *Walmesley v. Russel*, 6 Mod. 200.

(s) 6 Mod. 104. 2 Salk. 696. Holt, 40.

yet, that no one will assert, that, to say one has committed a trespass will bear an action, or that at least the thing charged upon the plaintiff must be *scandalous*." And in the same case it was held, that where the penalty for an offence by a statute was of a pecuniary nature, an imputation of such an offence would not be actionable, even though in default of payment the statute should direct the offender to be set in the pillory, since the setting in the pillory was only for want of money, and not the direct penalty given by the statute.

In *Button v. Heyward* (t), Fortescue Justice observed, "It was the rule of Holt, C. J. to make words actionable *whenever they sound to the disreputation of the person of whom they were spoken*; and this was also *Hale's* and *Twisden's* rule, and I think it a very good rule."

Such is the nature of the general rules upon which the older decisions were founded.

The ground of an action for words in *the absence of specific damage*, is, as has already been seen, the *immediate tendency in the words themselves to produce damage to the person of whom they are spoken, in which case, presumption supplies the place of actual proof*. The immediate and obvious inconveniences resulting from a

(t) 8 Mod. 24.

*charge of crime are, the party's degradation in society, and his exposure to criminal liability.* In the former case the presumption is, that he has lost the benefit of intercourse with society; in the latter, that he is placed in jeopardy, and that the suspicion excited by the report, may produce a temporary deprivation of his liberty until his innocence can be made manifest (u). Further than the evil of a temporary privation, the presumption cannot in general be carried, since a *mere false report* cannot of itself affect the party's life; and *if the report be true, he is not, as will afterwards be seen, entitled to an action.* Cases may however occur, where the detriment may be much more serious than a temporary loss of liberty. It is very possible to suppose, for instance, that an unfortunate combination of circumstances may leave the question of guilt or innocence, in a capital case, so nicely poised in the mind of the jury, that a prejudice instilled by a previous report, may turn the scale against the accused though really innocent; and this apprehension was still more formidable, when the law required a man's jury to be summoned from the *neighbourhood*, a place likely to be the most strongly infected with the prejudice.

(u) The being of *bad fame*, or keeping company with persons of scandalous reputation, was formerly a reason for commitment. Haw. b. 2. c. 12. p. 8, 9, 10, 11.

He might also be deprived, by means of such slander, of the benefit of general evidence as to his character (*x*). The liberty of every individual is considered by the law to be so valuable, that the very probability of its suspension is held sufficient to enable him to assert his innocence in court, to avert the evil apprehended, and to recover damages for the injury at the very earliest opportunity.

Since then the grounds of action are to be found in one or both these consequences, namely, the degradation of the party in society, or his liability to criminal animadversion, it becomes material to ascertain, by reference to the decided cases, under what restrictions one or both of these can constitute the foundation of such an action. First, it is to be observed, that though these two consequences cannot be completely separated, inasmuch as a greater or less degree of discredit must necessarily attach to every violation of the existing law, yet that *the party's jeopardy, in a legal point of view, is regarded by the law as the principal ground of action.* This appears from the general scope and tendency of the body of cases, to be found in the books

(*x*) And as previous character is usually taken into consideration in diminution of punishment, when it is discretionary, even a guilty person may be seriously injured by false reports to his prejudice.

relating to this copious subject, in which, though the discredit to the party is frequently a topic of discussion, yet the main question, for the most part, turns upon the penal consequences of the offence, and the certainty wherewith it is charged.

There are, however, many instances, to be found which prove, that criminal liability is not always the peculiar and exclusive ground of action, and in which a remedy has been given on account of imputations, which, if believed and even proved, could not have subjected the plaintiff to any future penalty:—For instance,

The defendant said, “Robert Carpenter (y) was in Winchester Gaol, and tried for his life, and would have been hanged had it not been for Leggat, for breaking open the granary of farmer A. and stealing his bacon.”

In (z) *Gainford v. Tuke* the words were—“Thou wast in Launceston Gaol for coining!” The plaintiff replied, “If I was there, I answered it well.” “Yea,” said the defendant, “you were burnt in the hand for it!”

In *Boston v. Tatham* (a). The action was brought for saying that the plaintiff was a thief, and had stolen the defendant’s gold. It was con-

(y) *Carpenter v. Tarrant*, Rep. Temp. Hard. 339; see also *Cuddington v. Wilkins*, Hob. 81.

(z) Cro. Jac. 536.

(a) Cro. J. 622. Vid. Sty. 49. All. 35. 1. Vin. Ab. 415. pl. 8.

tended, in arrest of judgment, that the words not being certain as to time, they might be taken to refer to the time of Queen Elizabeth, since which there had been divers general pardons, in which case no loss could happen from the scandal. But the court said, that it is a great slander, to be once a thief: and that although a pardon may discharge of punishment, yet the scandal of the offence remains.

In the above cases of *Carpenter v. Tarrant* and *Gainford v. Tuke*, (the former of which was cited by Lord Ellenborough, C. J. in giving judgment in a late case (*b*)), the words import, that the plaintiff had been acquitted in the one case, and punished in the other; neither imputation, therefore, though believed, could have exposed either of the plaintiffs to future liability. In these and similar instances it is likewise to be observed, that though motions were made in arrest of judgment, the objection relied upon was, that the words contained no direct charge of felony; and it was not insisted upon as essential to the action, that the words must impute an offence which may expose the party to a future prosecution, though there was room in each of these cases for making the objection, had it been thought available. And in the case of *Boston v.*

(b) *Roberts v. Camden*, 9 East. Rep. 93.

*Tatham*, the court expressed an opinion, that, even allowing that the words fixed the offence to a period, since which the liability to punishment must have been discharged by a general pardon, yet that the words were actionable since the scandal of the offence remained. And although in these cases the principal ground upon which words of this description are held to be actionable seems to have been abandoned, yet the good sense of the decisions is obvious; for were it otherwise, the slanderer might always secure impunity by cautiously asserting that the party slandered had already suffered the punishment appertaining to the imputed offence.

Supposing it, however, to be perfectly true, that in some instances the presumption of prejudice to the plaintiff in society is a ground of action, independent of any detriment in a criminal point of view, yet it appears to be clearly established, that "*No charge upon the plaintiff, however foul, will be actionable without special damage, unless it be of an offence punishable in a temporal court of criminal jurisdiction.*"

Thus, by a long series of cases it has been decided, that to say a man is "forsworn (c)," or

(c) Mo. 365. Cro. Eliz. 429: Popham, 210. Ow. 62. Cro. Eliz. 135. 609. 720. 788. 1 Vin. Ab. 404. 1 Rol. Ab. 40. Com. Dig. tit. Action on the case for defamation, D. 7. 6 Mod, 200.



that he has taken a false oath, generally, and without reference to some judicial proceeding, is not actionable; and the reason is, that in the latter case a perjury is charged, for which, were the charge true, the party would be liable to be indicted and punished; in the other, no more than a breach of morality is imputed, of which the law does not take cognizance.

So, to accuse another of having secreted (*d*) a will, for the purpose of defrauding his relations, is not actionable: though a person, who by such means possesses himself of the testator's property, would be regarded by society in no better light than the stealer of an horse, or the picker of a pocket. Again, where, in general, bad principles and vicious propensities are imputed to the plaintiff, he is not entitled to any compensation in damages without proof of a specific loss; though a person known to possess such principles and propensities is as likely to be despised and avoided in society as if he had actually reduced them into practice.

The defendant (*e*) said of the plaintiff, "He is a brabblor and a quarreller, for he gave his champion council to make a deed of gift of his goods to kill me, and then to fly out of the country; but God preserved me."

(*d*) 3 Salk. 327.

(*e*) *Eaton v. Allen*, 4 Rep. 16. Cro. Eliz. 684.

Sir E. Coke (*f*), in his comment upon this case, says, "Upon great consideration and advisement, it was adjudged, that the words in the principal case were not actionable; for (he adds) *the purpose or intent of a man, without act, is not punishable by law.*" And this rule seems in all times to have been adhered to with more consistency than is generally observable in decisions relating to this branch of the law, though many cases have been deemed to fall within the rule, where the words plainly imported an act done.

Thus, in the very case of *Eaton* and *Allen* above cited, there was more than a mere intention to procure the commission of a murder; there was a solicitation to commit one, which is of itself an inditable offence.

In *Lewknor* (*g*) v. *Cruchley*. The words were, "He and another, knowing that J. S., a goldsmith, did carry with him a great deal of plate, did lie in wait to rob him, and set upon him by the highway; but he raising the country, they did fly away, and Lewknor lost his horse, and they both were driven to ride away upon one horse." It was contended in an arrest of judgment, that by the plaintiff's own showing, no

(*f*) 4 Co. 16. pl. 10; and see Lord Ellenborough's dictum 4 Esp. C. 219.

(*g*) Cro. Car. 140.

felony was charged upon him, but nothing more than a mere intent ; but the court were of opinion, that the action well lay, for that not only an *intent*, but a *fact* was charged, for which fine and imprisonment were due.

The cases are so uniform upon this point, that it would be superfluous to cite further instances to show that, for an imputation of evil inclinations or principles, no action lies ; unless, indeed, as will afterwards be considered, it affect the plaintiff in some particular character, or produce special damage.

And so general terms of abuse, expressive of evil inclinations and corrupt manners, as rogue (*h*), rascal, scoundrel, and the like, are not actionable, for they do not impute any precise and definite offence punishable in the temporal courts. *So it has been said, that the word swindler is too general to support an action*, but Mr. J. Aston formerly held otherwise (*i*).

In the case of *Jones v. Herne* (*h*), C. J. Willes said, that if it were now *res integra*, *he should hold, that calling a man a rogue, or a woman a whore, in public company, was actionable*.

It seems also to be clearly established, that words imputing an offence (*l*), *merely spiritual*, are not in themselves actionable ; and the reason

(*h*) 3. Bl. C. 124. 1. Vin. Ab. 417.

(*i*) 1 T. R. 753.

(*k*) 2 Wils. 87.

(*l*) 4. Co. 20.

assigned for this is (*m*), that the person slandered may, for such words, institute a suit in the spiritual court; and that if an action were to be entertained in a temporal court, the party would be twice punished for the same words. Whatever merit this reason may possess, the rule itself seems to be fully established, that, where oral defamation concerns matter merely spiritual, and determinable in the ecclesiastical court; as if it impute adultery, fornication, or heresy, it is no ground of action at common law.

The power of the spiritual court is, however, confined to the infliction of penance *pro salute animæ*, and does not extend (*n*) to the awarding damages or amends to the injured party.

In the particular class of cases where acts or habits of incontinence have been imputed to females, much doubt has been entertained, whether an action was maintainable: these, however, will be hereafter considered under a more appropriate division of the subject, since it seems both from actual decision and analogy, that such imputations cannot in general be considered actionable as charging a temporal crime (*o*).

In *Barnabas (p) v. Traunter*. The plaintiff

(*m*) Salk. 694. 12 Mod. 106.

(*n*) 4 Co. 20.

(*o*) 1 Vin. Ab. 392. Cro. J. 323. 473. Poph. 36.

(*p*) 1 Vin. Ab. 396.

declared, that he was a parishioner of S., and that the defendant, being vicar there, with the intent to scandalize the plaintiff, and to draw an ill opinion of him among his neighbours, and to exclude him from the church, and to deprive him of all the benefit of hearing divine service in the said church ; in the time of divine service, in the hearing of the parishioners, maliciously pronounced the plaintiff excommunicated, and further refused to celebrate divine service till the plaintiff departed out of the church ; upon which the plaintiff was compelled to go out of the church ; whereas the plaintiff was not excommunicated ; by which means the plaintiff was scandalized and hindered of hearing divine service for a long time ; and for the clearing of this scandal and showing his innocency therein, was put to great *trouble and expense*. And the action was held to be maintainable, though the plaintiff did not show that any man avoided his company, or forbore to trade or deal with him, or that he had any temporal or special loss ; for it was said, this is a great and malicious scandal, though to his soul and though spiritual.

Though scandal to the soul, was the reason assigned for allowing the plaintiff to recover in this instance, the case itself can scarcely be considered as an exception to the general rule ; for, though a charge of excommunication supposes

nothing more than a spiritual offence or contempt upon which it is grounded, an imputation of which offence would not be actionable, and although the deprivations of the spiritual benefits complained of cannot be considered as a temporal loss; yet, excommunication itself is attended with many serious temporal inconveniences: the object of it is excluded from the society of all Christians; is disabled to do any act that is required to be done by one that is *probus et legalis homo*; he cannot serve upon juries; cannot be a witness in any court; and, which is still more serious, he cannot bring an action, real or personal, to recover lands or money due to him (q). He is further liable to the writ (r) *de excommunicato capiendo*, by which the sheriff is directed to take the offender and imprison him in the county gaol, till he is reconciled to the church. On the ground of these temporal deprivations under which a person excommunicated labours, as well as of his having been put to *expense*, the above case may perhaps be considered as authority, consistently with the general rule.

The rule itself is liable to so little doubt that it would be losing time to cite cases in support of it, otherwise than by way of general reference (s),—one instance may suffice.

(q) Litt. 201. (r) Fitz. N. B. 62. (s) 1 Vin. Ab. 392.

The defendant (*t*) said that the plaintiff “ had two bastards, and should have kept them ;” by reason of which, words and discord arose between the plaintiff and his wife, and they were likely to have been divorced. After verdict it was moved, in arrest of judgment, that these words were not actionable, because he doth not show any temporal loss, as loss of marriage, or the like ; but this imagination to be divorced is not to any purpose, and it is but a causeless fear ; and of that opinion was all the court.

But where the words impute an offence for which, though of *spiritual cognizance*, the plaintiff is liable to *punishment in a temporal court*, they are actionable.

So that to impute incontinency to a female in London is actionable, because by the custom of the city she is liable to be carted for her offence (*u*).

So the calling a woman, living in the borough of Southwark, “ whore,” is actionable (*x*), because she is liable to public carting by prescription.

So, to say that a man is the father of a bastard, is not actionable, unless it be alleged of a bastard likely to become chargeable to the parish, for

(*t*) Cr. J. 473.

(*u*) 12 Mod. 106. Holt. R. 40. 1 Vin. Ab. 395.

(*x*) Keb. 418. Sid. 97. 1 Vin. Ab. 395.

otherwise he is not liable to the penalties of the statute (y) of Elizabeth.

So, to accuse another of fornication was held to be actionable, whilst the statute making it a temporal offence was in force (z).

Although the action itself be limited to cases where the offence charged is defined by law; yet, as has been shown, the placing the party in jeopardy is not the exclusive ground of action. It may be asked then, as the loss in some cases consists solely in the prejudice to the plaintiff's character in society, without any regard to his being endangered in law, how happens it that the extent of the action is confined by the former of these circumstances, and is not co-extensive with the latter? The answer seems to be, that though the presumption of prejudice to the plaintiff's character in society is frequently the most serious ground of complaint, yet that such prejudice does not in itself furnish a rule sufficiently clear to determine the extent of the action. Whence it becomes necessary to adopt some other boundary, which though not exactly commensurate with the injury to be remedied, may, from the greater certainty and facility with which it can be applied, conduce in the main to the public good.

(y) *Salter v. Brown*, 1 Vin. Ab. 397. Cro. Car. 436.

(z) 2 Sid. 21.



To say that a man is a bad father, husband, or son that he is a drunkard or liar, or charge him with want of veracity in a single instance, must, if the imputation be believed, induce a worse opinion to be entertained of him; and must therefore be considered as a real detriment to an innocent party.—If then discredit alone were to be adopted as the criterion, the action would extend to every degree of discredit; a rule highly inexpedient, both on account of the endless litigation which it would produce, and of the other incident mischiefs which have been already touched upon; but if it be admitted, upon the principle of expediency, that some limitation be necessary, perhaps none could be adopted more convenient than the one recognized by the law, which confines the action to imputations of offences punishable in the temporal courts. The rule itself has the advantage of clearness and certainty in its operation, and is nearly co-extensive with our criminal code; and it is to be remembered, that where imputations do not fall within its scope, yet any specific damage accruing to the party in confidence of them, will entitle him to a remedy.

The action then is confined to cases where an offence is charged punishable in the temporal courts, it is next to be considered whether the action extends to *all*, or to *what portion of these*.

There may be some impropriety in supposing, that a violation of any existing law is not in some degree discreditable ; for although the long catalogue of crimes, defined in our penal code, exhibits guilt in an almost infinite variety of shades ; yet still the most trivial offender cannot in strictness be deemed wholly exempt from blame.

In many instances, however, the discredit attaching to the commission of the offence charged, is so minute, that it can scarcely be considered as the ground of action.

In this, therefore, and many other similar cases, the actionable quality of the words results not from the degree of discredit attached to the party, but to the penal nature of the offence imputed (a).

The defendant said, "thou hast harboured and received thy son into thy house, knowing before,

(a) The distinction between that which is *malum prohibitum* and *malum in se* has been frequently denied by great authorities. It seems indeed to be impossible to contend that any wilful violation of the existing law is not more or less immoral. Every legal prohibition must be presumed to be a beneficial one to society, and whoever voluntarily offends against it, takes upon himself to substitute his own judgment in the place of that of the supreme legislative authority of the state. Such a practice, if general, would obviously be inexpedient, and therefore immoral, inasmuch as it would inevitably lead to frequent violations of the existing law.

that he was a seminary priest (*b*).’’ It was held, that the words were scandalous and actionable, the offence having been made felony by statute (*c*). Yet it can scarcely be presumed, that in this case the imputation could seriously injure the father’s character in society, and consequently the remedy was given because the words endangered him in law.

The books abound with cases which prove, that a charge of TREASON, or any species of FELONY, whether it existed at Common Law or was so constituted by statute, has always been considered as actionable : to these may be added that of PERJURY, which in its very nature tends to destroy the plaintiff’s credit in society ; the courts have, however, gone beyond this, and imputations of many other misdemeanors have given rise to a numerous class of decisions.

In *Stone v. Smalcombe* (*d*), the defendant having been arrested under a warrant made upon a latitat, said, “ this is a counterfeit warrant, made by Mr. Stone (the plaintiff) ;” and though it was alleged for the defendant in arrest of judgment, that forging a warrant was not a forging within the statute of Elizabeth, the court held, that the words were actionable.

(*b*) *Smith v. Flynt*, Cr. J. 300.

(*c*) 27 Eliz. c. 2.

(*d*) Cr. J. 648.

So in many cases the charging a mere solicitation or attempt to commit a felony has been held to be actionable. In *Lady Cockaine's* case (e), the words were—"my Lady Cockaine did offer two shillings to a woman with child to get her a drink to kill her child, because it was gotten by J. S., Sir Thomas Cockaine's butler." And it was moved, that an action did not lie for the words ; but it was adjudged for the plaintiff, for by them it was said, the lady's credit is impaired ; and, if true, there was *cause to bind her to her good behaviour*, although it was not said, that she did give money, or that any hurt was done.

So in *Tibbott v. Haynes* (f), the defendant said, "Tibbott, and one Gough, agreed to have hired a man to kill me, and that Gough should show me to the hired man to kill me." Upon motion in an arrest of judgment, J. Gawdy was of opinion, that the words were not actionable, because it was not alleged that any act was done by the plaintiff, nor any thing put in ure by him, but only a communication between him and Gough ; and that it would have been otherwise had the defendant said, "he hired a man to kill me." But Wray and Fenner, justices, were of a different opinion, and judgment was given for the plaintiff. In *Cardinal's* (g) case,

(e) Cro. Eliz. 49.

(f) Ibid, 191.

(g) 4 Co. 16.

the words were,—“ If I had consented to Mr. Cardinal, J. H. had not been alive.”—And the plaintiff had judgment. In the case of *Eaton v. Allen* (h) above cited, the words were, “ He is a brabblor and a quarreller, for he gave his champion council to make a deed of gift of his goods to kill me, and then to fly out of the country, but God preserved me :” and though the former cases were cited, judgment was arrested, and the reason given in the report in Croke is, “ that the first words, ‘ he is a brabblor, &c.’ are not actionable ; and that the latter words, commencing with ‘ for,’ did not contain any express affirmation.” But Lord Coke observes, “ that it was adjudged in this case upon great consideration and advisement, that the words were not actionable because the purpose and intent of a man, without act, is not punishable by law ;” this reason is, however, defective, for solicitation is in itself an act ; and this case was overruled in the subsequent one of *Lewknor v. Crutchly* (i).

The defendant there charged the plaintiff with having “ set upon a goldsmith in the highway with intent to rob him.” It was contended in arrest of judgment, that no felony was charged, but a mere misdemeanor ; and the case of *Eaton v. Allen* was cited ; but the court delivered their

(h) 4 Co. 16. Cro. Eliz. 684.

(i) Cro. Car. 140.

opinions *seriatim*, that the action lay, and said, "that although the defendant charged him with an act that is not felony, yet he chargeth him not only with the intention, but with a fact, which is as near to felony as may be, and with such an offence as is more than intent only, and more than riot, and for which fine and imprisonment are due." And Jones, J. cited *Wicks's* case, where the defendant said, "nine persons set upon me to have robbed me, and you (Wicks) was one of them;" and it was adjudged that the action lay.

If any distinction can be made between the two last cases (*k*), it consists in this; that in the former there was a solicitation only, to commit felony; in the latter there was an overt act exercised in pursuance of a felonious intention. Such a distinction is at all events now no longer available, since it is clear that a solicitation to commit felony constitutes a misdemeanor (*l*).

So where the charge is of a misdemeanor not at all connected with felony.

During an election of members (*m*) to serve in parliament, the defendant, holding up money in his hand, said of the plaintiff, who was a candidate, "these guineas are Mr. Bendish's (the

(*k*) i. e. *Eaton v. Allen*, and *Lewknor v. Oruchley*.

(*l*) 2 East, 6.      (*m*) *Bendish v. Lindsay*. 11 Mod. 194.

plaintiff's) money, and were given me to vote for him ; he has bought my vote, and he shall have it." It was contended, in arrest of judgment, that no words are actionable unless they subject the plaintiff to a temporal punishment, and that nothing had been said that could subject the plaintiff to an indictment on the statute ; but Holt, C. J. was clearly of opinion, that the action lay, and judgment was given for the plaintiff. It is to be remarked, that bribery was an offence at Common Law (n), and punishable by indictment or information.

Where a commission had been awarded (o) out of Chancery, to the plaintiff and three others, with the assent of the parties to a suit, to examine witnesses, and to hear and determine, the defendant, who was one of the parties (said of the plaintiff), " Sir George Moor is a corrupt man, and hath taken bribes of Richard King (the other party to the suit) ;" And likewise further said, " Richard King hath set Sir George Moor on horseback, with his bribes, to pervert justice and equity." Upon motion in arrest of judgment, the court said, " that the plaintiff having the King's commission to execute, if he take bribes to execute it, it is a breach of the trust re-

(n) Burr. 1335. 1359.

(o) *Sir Geo. Moor v. Forster*, Cro. J. 65.

posed in him, and is so great an offence, that he may be indicted and fined at the Common Law ;” and the plaintiff had judgment.

To charge a person with having given a sum of money to the commissioners to be made purser of a man of war, was held actionable ; such an offence being a corruption of a public trust, and a crime both in the commissioners and the person tempting them, and the words therefore actionable, as imputing a criminal charge (*p*).

In the case of *Sir William Russell v. Ligon* (*q*), it was adjudged and agreed, that an action lies for charging the plaintiff with being the author of a libel, though the making a libel is not an offence which concerns life or member, but punishable only by fine and by imprisonment in the Star Chamber, or upon an indictment at Common Law. In the principal case, it seems, however, to have been averred in the declaration, that the plaintiff was a justice of the peace.

So to say, a person ‘keeps a bawdy house, is actionable, because the offence is indictable ; and though it has been held, that such words are not actionable, the reason on which the judgment was given is bad, for it was assumed (*r*), that

(*p*) *Purdy v. Stacey*, Burr. 2698.

(*q*) 1 Vin. Ab. 423. pl. 27. 1 Com. Dig. tit. Action on the case for defamation 8, 9. 1 Roll. Ab. 46.

(*r*) Cro. Eliz. 643, sed vid. 1 Roll. 44. 1 Buls. 138.



the offence was not indictable at Common Law.

So, to accuse a person of subornation of perjury (s).

So the charging another with receiving goods, knowing them to be stolen, was actionable, whilst the offence remained a mere misdemeanor, and punishable by fine and imprisonment at Common Law.

For though it was held in the case of *Dawes* (t) v. *Bolton*, that for the words "Thou art a knave, and hast received stolen swine; and hast received a stolen cow, and thou knowest they were stolen!" No action lay. Yet the ground of decision was, that the words were to be considered in *mitiori sensu*; and that it might be, that the defendant meant that the plaintiff had received them as bailiff or lord of a manor, who had liberty to have waifs and felon's goods; and it seems to have been allowed, that, had a guilty knowledge been intended, the words would have been actionable. In *Cox* (u) v. *Humphreys*, the defendant said, "Thy boy (the plaintiff's son) hath cut my purse, and thou hast received it, knowing it; and hast the rings and money that were there in thy hand!" And it was held, that the words were not actionable, because it

(s) Cro. J. 158.

(t) Cro. Eliz. 888.

(u) Ibid, 862.

did not appear *that a felonious taking* was meant.

And it seems that to charge a brewer with selling unwholesome beer is actionable, since the selling such beer is *an indictable offence* (x).

In *Sir Lionel Walden* (y) v. *Mitchell*, the defendant said, that the plaintiff went to mass, and the words were held actionable; since by the statute 27 Eliz. c. 4. the offender was liable to forfeit £100, and to be imprisoned for a year.

So, whilst the statutes against witchcraft were in force, it was held, that to say "Thou art a witch and a sorcerer," was actionable (z): And Gawdy J. said, "If he bewitches men so as they die, it is felony: if he uses witchcraft in any other way, he shall stand in the pillory; so that it is a slander in every respect, and a good cause of action."

In *Mayne v. Digle*, (a) it is laid down, that *an action lies for any words which import the charge of a crime for which a person may be indicted.*

From these instances cited, and a number of similar ones to be met with in the reports, it seems difficult to find any other limit for the extent of the action than that laid down in the

(x) 1 Vin. Ab. 477. Free. 25. 6 Bac. Ab. 210.

(y) 2 Vent. 265. (z) *Rogers v. Gravat*, Cro. Eliz. 571.

(a) Free, 46.

last case; and though there are *dicta* and even *decisions* to the contrary, both may, perhaps, be considered as borne down by the current of the authorities cited, and others, in which words have been considered actionable, as charging an indictable offence.

Thus it has been held, that no action lies for publishing of the plaintiff, that he is a *registrator* (b); and the reason given is, because the offence of regrating, is not punishable by loss of life or limb; but this decision cannot be considered as law, since it is contradictory to all the cases last cited.

So it has been held, that for the words "Thou art a common barretor (c), and I will indict thee for it at the next assizes," no action lies.

But for the words, "Thou maintainest such a suit," it was said by Popham, C. J. (d), that an action had been held maintainable upon good deliberation, in the case of *Sir H. Portman v. Stowell*; maintenance being unlawful and odious.

In *Ogden (e) v. Turner*, as already observed, it was expressly held by Holt, C. J. that to render words actionable it is not sufficient that the party may be fined and imprisoned for the of-

(b) *Seoble v Lee*, 2 Show. 32.

(c) Cro. Eliz. 171. Yel. 90.

(d) 1 Vin. Ab. 424. pl. 34. Mo. 428.

(e) Salk. 696. Holt. 40.

fence. For that if any one be found guilty of a common trespass, he shall be fined and imprisoned; yet no one would assert, that to say one has committed a trespass, will bear an action. This dictum, however, was materially contradicted by what fell from Ld. C. J. De Grey, in giving judgment in the case of *Onslow (f) v. Horne*. In that case he observed, "As far as I can collect, for determinations in actions for words, there seem to be two general rules whereby courts of justice have governed themselves, in order to determine words spoken of another to be actionable. *The first rule is, that the words must contain an express imputation of some crime liable to punishment—some capital offence or other infamous crime or misdemeanor; and the charge upon the person spoken of must be precise.* In the case of *Ogden and Turner*, the words are, "Thou art one of those that stole my Lord Shaftesbury's deer!" and were not held actionable; for though imprisonment be the punishment in those cases, yet per Holt, C. J. '*It is not a scandalous punishment; a man may be fined and imprisoned in trespass; for,*' says he, "*there must not only be imprisonment but an infamous punishment.*" I think Lord Holt carries it too far, as to precision; for it is laid down in

(f) 3 Wils. 177.

Finch's Law (*g*), 'If a man maliciously utters any *false slander*, to the endangering one in law, as to say, "He hath reported that money is fallen," for he shall be punished for such report.' Here is the case of a crime, and the punishment not infamous; and yet Finch seems to say, that an action lies for these words."

In *Holt v. Scholesfield* (*h*), Mr. J. Lawrence observed, with regard to the case in *Bulstrode* (*i*); "I think Mr. Justice Williams goes too far in saying, *that words that tend to the infamy, discredit, or disgrace, of the party, are actionable*."

The most correct rule is laid down in *Onslow v. Horne*. *The words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanour*. There is also a case in *Siderfin* (*k*), which is in direct contradiction to the case in *Bulstrode*."

In many of the cases where charges of crime have been held actionable, it is observable that stress has been laid upon the terms *scandalous* and *infamous*, used as descriptive either of the crime charged or the punishment appertaining to it. Although this affords some reason to infer, that the actionable quality does not extend to all charges of misdemeanour for which fine and im-

(*g*) 185. (*h*) 6 T. R. 691. (*i*) 1 Buls. 40. (*k*) 1 Sid. 48.

prisonment may be inflicted, yet a distinction of this nature seems unwarranted by the cases, and would afford a very dubious rule, the terms scandalous and infamous being of themselves words of very indefinite import. It would be a very difficult task to ascertain the precise point in the scale of offences where infamy and scandal cease to attach.

From these authorities, perhaps, it may be inferred generally, that, *to impute any crime or misdemeanour for which corporal punishment may be inflicted in a temporal court, is actionable without proof of special damage.*

Where the penalty for an offence is merely pecuniary, it does not appear that an action will lie for charging it; even though in default of payment, imprisonment should be prescribed by the statute, imprisonment not being the primary and immediate punishment for the offence (1).

Any objection as to the extent of the above rule, is in a great measure obviated by the statute of James I. which, where the damages given do not amount to forty shillings, limits the costs to the amount of the damages: this wholesome provision was found of great use in confining this species of litigation, (which had before increased to a prodigious extent,) within narrower and more convenient boundaries.

(1) 6 Mod. 104.

2ndly. In what manner must the offence be imputed?

Where the imputation contains a *direct charge* of crime in precise terms, little difficulty can occur in the application of the foregoing rule. In most instances, however, an unpremeditated use of words of doubtful meaning, or an intentional selection of them, for the purpose of impunity, have occasioned much perplexity and litigation. In a great proportion of cases, the question has been, not whether a charge of a specific offence is actionable? but whether, in fact, any offence has been charged by the words? The rule of law requires, that, to ground an action, "words imputing crime must be precise;" but it is by no means essential, that they shall carry on the face of them an open and direct imputation. Such a rule, it is clear, would afford no security against calumny, which may be as effectually conveyed in artful allusions to collateral matter, and oblique insinuations, as by the most explicit assertions.

It is, however, incumbent upon the party who complains that he has suffered from an imputation of crime, to show with certainty, the injurious nature of the communication.

In order to establish this point, two circumstances are necessary:—

1st. That the words or signs used should either

of themselves, or by reference to circumstances, be capable of the offensive meaning attributed to them.

2dly. That the defendant did, in fact, use them in that sense.

The capability of the words or signs to bear a particular construction, must, it is evident, appear upon the plaintiff's statement of his case; for otherwise it would not judicially appear that he was entitled to recover. That the defendant did, in fact, use them in that sense, is a matter of evidence to be decided upon the trial, which will be a subject for future consideration. It may, however, be necessary to observe here, that if it appear from the words or signs themselves, or from circumstances, that they are capable of conveying the particular meaning attributed to them by the plaintiff, it will, after verdict for the plaintiff, be taken for granted, that the words and signs were, in fact, used to convey such meaning; for that is a matter upon which the jury alone can decide, and which they must be convinced of before they can give their verdict for the plaintiff.

Any objection, therefore, to the words or signs as stated upon the record, is grounded upon the supposition that it does not sufficiently appear, that they are CAPABLE of an actionable meaning.



It will be proper, therefore, next to consider the different kinds of ambiguities which may arise, not only in the particular case where some crime has been charged, and where doubt most frequently occurs, but with relation to cases of slander and libel in general, which are governed by the same rules of construction.

Words or signs may be divided into three classes :—

1st. Those which bear an obvious and precise meaning on the face of them ; as if A. said to B., “ You murdered C.”

2dly. Those which on the face of them are of dubious import, and are capable either of a criminal or innocent meaning ; as if A. say to B., “ You were the death of C.”

3dly. Those which are *prima facie* and abstractedly innocent, and which derive their offensive quality from some collateral or extrinsic circumstance ; as if A. say to B., “ You did not murder C. ! ” which words, from the ironical manner of speaking them, may convey to the hearers as unequivocal a charge of murder as the most direct imputation.

With respect to ambiguities arising out of the second and third classes, it is now the settled rule of law, that *both judges and juries shall understand words in that sense which the author intended to convey to the minds of the hearers,*

*as evidenced by the whole circumstances of the case. That it is the province of the jury, where such doubts arise, to decide, whether the words were used maliciously, and with a view to defame, such being matter of fact to be collected from all concomitant circumstances; and for the court to determine, whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action.*

It was long, however, before this rule, rational as it is, and supported by every legal analogy, prevailed in actions for words; and before the favourite doctrine of construing words in their *mildest sense*, in direct opposition to the finding of the jury, was finally abandoned by the courts.

A very few specimens of cases where the doctrine of the *benignior sensus* was allowed to prevail, may be deemed sufficient. "Thou art as arrant a thief as any in England; for thou hast broken up J. S.'s chest, and taken away 40*l*." After verdict for the plaintiff, the court, on motion in arrest of judgment, held, that the action lay not: for, he sheweth not that he stole any money, or robbed him of any money; for an action is not to be maintained by intendment; but by express words, and the words do not prove any felony committed; for the money may be taken

away, and the chest broken open in the mid-day (u), and in the presence of divers, and therefore it is not any felony.

The defendant said (n), "Thou art a lewd fellow ; thou didst set upon me by the highway, and take my purse from me, and I will be sworn to it !" After judgment for the plaintiff, error was assigned, because the words did not charge the plaintiff with felony, nor with any felonious taking away ; and it may be, he took away the purse in jest, or for some other cause ; and of that opinion were all the Judges and Barons. The defendant (o) said, "Thou art a thievish rogue, and hast stolen bars of iron out of other men's windows !" It was held, that the action lay not ; for the bars of iron are parcel of the freehold, and the stealing of them is not any felony ; and it shall not be intended of bars lying in windows, as was objected that it might be ; for it shall be taken in the best sense for the defendant. And it was said, that it was adjudged in one *Bridge's* case, that for saying, "Thou art a thief, and hast stolen my corn in the field," no action lies ; for it shall be intended standing corn, which is not felony ; wherefore it was adjudged for the defendant.

(n) *Forster v. Browning*, Cro. J. 687.

(n) *Holland v. Stoner*, Cro. J. 315.

(o) Cro. J. 204.

In *King (p) v. Bagg*. In error. The action was for the words, "Mr. J. D. was robbed of £40, and 100 marks' worth of plate, and Alice Bagg (the plaintiff) and J. S. had it, and for which they will be hanged!" And after verdict and judgment for the plaintiff, it was assigned for error, that an action lies not for these words: for he doth not say that she stole it, and it may be that they came to it by lawful means; and although he saith that they will be hanged for it, these words by themselves will not maintain an action, and they do not enforce the first words; wherefore the judgment was reversed.

"Thou (q) dost lead a life in manner of a rogue, I doubt not but to see thee hanged for striking Mr. Sydman's man who was murdered!" And it was held that the words were not actionable, for they are not positive for the murder of Mr. Sydman's servant; he might be beaten by the plaintiff, and murdered by another. Actions of slander do not lie upon inference.

It seems to be unnecessary to adduce more instances of the prevalence of this rule of construction; the following may be adduced in support of the more rational doctrine which now prevails.

In *Ceely (r) v. Hoskins*, in error. The words

(p) Cro. J. 331. (q) Ibid, 331. Jenk. 302. (r) Cro. Car. 509.

were, "Thou art forsworn in a court of record, and that I will prove!" It was contended, after verdict for the plaintiff, that the action would not lie, because he did not say in what court of record he was forsworn, nor that he was forsworn in giving any evidence to the jury; that it might be intended only that he was forsworn, not judicially, but in ordinary discourse in some court of record: But (per Croke) "Jones, Berkeley, and myself, held clearly that the action well lay, and that such foreign intendment as Maynard (for the defendant) pretended, shall not be conceived, and it shall be taken that he spake these words maliciously, accusing him of perjury; and for a false oath taken judicially, upon judicial proceedings in a court of record; and shall be taken according to the common speech and usual intendment: as to say, such a one is a murtherer, without saying whom he murdered, or when, an action lies; and it shall not be intended that he was a murtherer of hares, unless such foreign intendment be shown or discovered in pleading."

In *Baal (s) v. Baggerley*. The words were, "Thou hast forged, a privy seal, and a commission! Why dost thou not break open thy commission?" And after verdict for the plaintiff, it was contended for the defendant, that the

words were not actionable ; for it did not say the king's privy seal, nor any writ under the privy seal ; also he said not what commission ; and the words subsequent, " thy commission," showed that he meant a commission made by the plaintiff himself : but the judges, having taken time to consider (Berkeley doubting) afterwards, delivered their opinions—" That the action well lies ; for the words be spoken maliciously ; and being alleged in the declaration, that he spake them to scandalize him, for forging of the privy seal and commission ; and being found guilty, it shall be intended according to the vulgar interpretation, to mean the king's privy seal, the counterfeiting whereof is treason ; and a commission shall be intended the king's commission, under the privy seal ;" and Berkeley agreed with the others.

In *Somers (t) v. House*. The words were, " You are a rogue, and broke open a house at Oxford ; and your grandfather was forced to bring over £30, to make up the breach !" And after verdict for the plaintiff, it was moved, in arrest of judgment ; because, *rogue*, is not actionable ; and *breaking open the house*, but a trespass ; and *making up the breach*, might be repairing ; but the court seemed contrary : for, upon all the words together, a man who heard

(t) Holt, 39.

them could not intend other than a felonious breaking of the house ; and though in *the old books the rule was, to take the words in mitiori sensu*, yet per Holt, *they would take the words in a common sense, according to the vulgar intendment of the bystanders.*

In *Baker (u) v. Peirce*. The words were, “ Baker stole my box-wood, and I will prove it ! ” After verdict for the plaintiff, Serjeant Darnell moved, in arrest of judgment, that these words are not actionable ; for they shall be taken to mean wood growing, or the like, whereof only a trespass can be committed. That to say, you are a thief, and have stolen my timber, or my apples, or my hops, is not actionable : for where words import either a felony or a trespass, they shall be taken in the mildest sense, unless there be other words to determine them in the worse sense : as to say, he stole my timber out of my yard, or my hops in a bag ; and cited *Mason (x) v. Thompson*, — “ I charge thee with felony for taking forth from J. D.’s pocket, and I will prove it ! ” The words were held not to be actionable, because it should not be intended to mean a felony, not being directly affirmed. But Holt, C. J. and the court denied that case to be law, for the taking out

(u) Lord Ray. 959. 6 Mod. 234. Holt, 654.

(x) Hutt. 38.

of a man's pocket must be intended a felonious taking.

For the plaintiff it was contended, that the words, according to common parlance, imported a thing of which felony might be committed.

And afterwards the court gave judgment for the plaintiff; Powell, J. observing, "The case cited by my brother Darnell, is so, but the later books are contrary; and I will stick to the later authorities, being grounded on so much reason."

In the case of *Burges (y) v. Boucher*. The court observed, "There are several cases wherein it has been adjudged, that where words may be taken in a double sense, the court, after a verdict, *will always construe them in that sense which may support the verdict.*"

The plaintiff brought his action for the words, "He (z) is a clipper and a coiner!" After a verdict for the plaintiff, it was moved, in arrest of judgment, that the words did not charge the plaintiff with clipping or coining money; for they may be applied to many other things; but judged actionable, for it must be intended that he meant the clipping of money, and in that sense it is usually understood.

(y) 8 Mod. 240.

(z) 3 Salk. 325. 2 Vent. 172. 2 Lev. 51. 2 Sir T. Jo. 235.



In *Harrison (a) v. Thornborough*. The court observed, that, "Precedents in actions for words are not of equal authority as in other actions, because, *norma loquendi* is the rule for the interpretation of words, and this rule is different in one age from what it is in another. The words which an hundred years ago did not import a slanderous sense, now may, and *vice versâ*. In this kind of actions for words, which are not of very great antiquity, the courts did at first as much as they could, discountenance them, and that for a wise reason ; because generally brought for contention and vexation, and therefore, where the words were capable of two constructions, the court always took them *mitiori sensu*. But, latterly, these actions have been more countenanced ; for men's tongues growing more virulent, and irreparable damage arising from words, it has been, by experience, found, that unless men can get satisfaction by law, they will be apt to take it themselves. The rule, therefore, that has now prevailed, is, *that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them*.

In *Burton (b) v. Hayward and his wife*. The words spoken by the wife were, "George Button

(a) 10 Mod. 196.

(b) 8 Mod. 24.

(the plaintiff) is the man who killed my husband!" her first husband being dead. After verdict for the plaintiff, it was moved in arrest of judgment, that these words are not actionable for the uncertainty of the word *killing*, for it might be justifiable, or in his own defence, or *per infortunium*, and shall not be presumed felonious, and so made actionable by intendment: for it is a maxim, that words shall be taken in *mitiori sensu*. But it was said by Pratt, C. J. "There can be no question but at this day these words are actionable. In former times, words were construed in *mitiori sensu*, to avoid vexatious actions, which were then too frequent; but now, *distinguenda sunt tempora*: and we ought to expound words according to their general signification, to prevent scandals, which are at present too frequent. *We are to understand words in the same sense as the hearers understood them; but when words stand indifferent, and are equally liable to two distinct interpretations, we ought to construe them in mitiori sensu; but we will never make any exposition against the plain natural import of the words.*" "The word *killing* signifies a voluntary and unlawful killing, and is actionable. There are a great number of odd cases in the books;" And by Eyre, J. "the words are to be taken in *their worst sense*, for a malicious and felonious killing." And by Fortescue, J. "The maxim

for expounding words in *mitiori sensu*, has for a great while been exploded, near fifty or sixty years."

It was observed by Lord Mansfield, in the *King (c) v. Horne*, "It is the duty of the jury to construe plain words and clear allusions, to matters of universal notoriety, according to their obvious meaning, and as every body else who reads must understand them: but the defendant may give evidence to show they were used on the occasion in question in a different or qualified sense. If no such evidence is given, the natural interpretation of the words, and the obvious meaning to every man's understanding, must prevail.

"If courts of justice were bound by law to study for any one possible or supposable case, or sense, in which the words used *might be innocent*, such a singularity of understanding might screen an offender from punishment, but it could not recal the words, or remedy the injury. It would be strange to say, and more so to give out as the law of the land, that a man may be allowed to defame in one sense, and defend himself in another; such a doctrine would indeed be pregnant with the *nimia subtilitas* which my Lord Coke so justly reprobates."

In the case of *Peake (d)* and *Oldham*, Lord

(c) 1 Cowp. 672.

(d) Cowp. 277.

Mausfield said, "After verdict, shall the court be guessing and inventing a mode in which it might be barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not! Where it is clear that words are defectively laid, a verdict will not cure them; but where, from their general import, they appear to have been spoken with a view to defame the party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them. I am furnished with a case, founded in strong sense and reason, in support of this opinion. The name of it is *Ward v. Reynolds*, Pasch. 12 Ann. B. R. and it is as follows: The defendant said to the plaintiff, 'I know you very well! How did your husband die?' The plaintiff answered, 'As you may, if it please God!' The defendant replied, 'No; he died of a wound you gave him!' On not guilty, there was a verdict for the plaintiff; and on a motion in arrest of judgment, the court held the words were actionable, because, from the whole frame of them, they were spoken by way of imputation; and Lord C. J. Parker said, 'It is very odd, that after a verdict, a court of justice should be trying whether there may not be a possible case in which words spoken by way of scandal might not be

innocently said; whereas, if that were in truth the case, the defendant might have demurred, or the verdict would have been otherwise." So here, if shown to be innocently spoken, the jury might have found a verdict for the defendant; but they have put a contrary construction upon the words as laid, and have found that the defendant meant a charge of murder."

In the *King (e) v. Watson and others*, Mr. Justice Buller observed, "Upon occasions of this sort, I have never adopted any other rule than that frequently stated by Lord Mansfield to juries, desiring them to read the paper stated to be a libel, as men of common understanding, and say, whether, in their minds, it conveys the sense imputed."

In *Woolnoth (f) v. Meadows*, it was observed by Le Blanc, J., "That (after a verdict for the plaintiff) it is not sufficient to show, by argument, that the words will admit some other meaning; but the court must understand them as all mankind would understand them: and we cannot understand them differently in court from what they would do out of court.

In *Roberts (g) v. Camden*, which was an action for words alleged by the plaintiff to contain an imputation of perjury. After a verdict for

(e) 2 T. R. 206. (f) 5 East, 463. (g) 9 East, 96.

the plaintiff, on a motion in arrest of judgment, on the ground that the words did not impute the crime with sufficient certainty, Lord Ellenborough, C. J. in delivering judgment, observed, "The question simply is—Whether the words amount to such a charge? that is, whether they are calculated to convey to the mind of an ordinary hearer an imputation on the plaintiff of the crime of perjury. The rule which at one time prevailed, that the words are to be understood in *mitiori sensu*, has been long ago superseded; and words are now construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them." And in concluding, the same learned judge observed, that, "without adverting to the long bead-roll of conflicting cases which have been cited on both sides in the course of this argument, it is sufficient to say, that these words, fairly and naturally construed, appear to us to have been meant, and to be calculated to convey the imputation of perjury actually committed by the person of whom they are spoken; and that, therefore, the rule for arresting the judgment must be discharged."

From these cases, containing the opinions of some of the most enlightened judges of their own or any times, it may be collected—

1st. That where words are capable of *two con-*

*structions*, in what sense they were meant is a matter of fact to be *decided by the jury*.

2ndly. That they are to be guided in forming their opinion by the impression which the words or signs used were calculated to make on the minds of those who heard or saw them, as collected from the whole of the circumstances.

3dly. That such words or signs will, after a verdict for the plaintiff, be considered by the courts to have been used in their worst sense.

With respect to words, which apparently are harmless, and which derive their offensive meaning wholly from extrinsic circumstances, the preceding observations are applicable: the use of such words and signs as do in effect injure the reputation of an individual, are as much within the mischief as the most open charges: the grievance is, the loss of character; and by what means the wrong is effected is perfectly immaterial, either as to the suffering of the party, or the policy of the law providing him a remedy.

The (h) defendant wrote a pamphlet, called "Advice to the Lord Keeper, by a Country Parson;" wherein he would have him love the church as well as the Bishop of Salisbury—manage as well as Lord Haversham—be brave as another lord; and so gave every lord a character,

ironically ; and so it was set forth in the information, and the jury found him guilty. Upon motion in arrest of judgment, it was shown for cause, to arrest judgment, that there was no cause to charge the defendant, because he said no ill thing of any person ; and all he said was good of them. But to this it was answered, and resolved by the court, that this was laid to be *ironical; and whether it was so or not, the jury were judges*: they found it so. And that if this were not a crime, the defendant might, by contraries, libel any person.

Having thus inquired what general rules of construction have been adopted by the courts, their application to the class of cases where crime is imputed, and the degree of certainty and particularity requisite to render such charges actionable will next be considered.

The charge, to be actionable, must in general, as already stated, impute to the *plaintiff* an *act* of a *criminal nature*.

There are, however, some exceptions to this rule ; as where treason is imputed ; one species of which offence consists in *the compassing and imagining the death of the king* ; which words signify nothing more than the purposed design of the mind, and not the carrying such design into effect (i).

(i) 1 Haw. Pl. C. 86.



In the case of *Sir John Sydenham* (*k*) v. *Man*, the words were, "If Sir J. S. might have his will, he would kill the king!" and they were held to be actionable, although they referred to the will only; since it is a great offence to have such a will.

So where the party is charged with misprision (*l*) of felony; as where the defendant said, "He (*m*) knew of the murder of L., and did not reveal it till long after it came to his knowledge."

In other cases it must appear,

I. That some ACT was imputed by the defendant.

II. That such act is of a CRIMINAL NATURE.

III. That it was meant to be imputed to the PLAINTIFF.

I. That some ACT was imputed by the defendant.

The imputation of an act may be inferred,

1st. Although the terms of the communication be indirect.

2dly. Although the act imputed be, in legal strictness, impossible.

1st. Where the terms of the communication are indirect. It may be laid down as a general rule, that, wherever words are used, calculated to im-

(*k*) Cro. J. 407. (*l*) Vid. st. West. 1. 3 Ed. 1. c. 9.

(*m*) Yel. 154. 1 Vin. Ab. 446.

press upon the minds of the hearers a suspicion of the plaintiff's having committed a criminal act, such an inference may and ought to be drawn, whatever form of expression may have been adopted. And although such forms of expression may be reduced under general heads, and examples cited under each to illustrate this rule, yet, contradictory and inconsistent as many of the cases are, a reference to them cannot be considered as of essential importance; the rule itself being so well established, that no case in contradiction to it can now be considered as a precedent.

It may, however, be deemed proper to select a few instances of cases falling under each division.

Where the terms of the communication are indirect, the imputation of an act committed may be inferred, where the defendant expresses a *suspicion* or *opinion*, or *institutes a comparison*, or delivers the words as matter of *hearsay*, or by way of *interrogation* or *answer*, or *exclamation*, or uses *disjunctive* or *adjective* words, or speaks *ironically*; or, in general, where the statement virtually includes or assumes the commission of the principal act, or a strong suspicion of it.

From words of *suspicion* or *opinion*. Yeoman (n) said of Hext, "For my ground in Aller-

(n) 4 Co. 15. Poph. 210. Latch. 176. 3 Buls. 262.

ton, Hext seeks my life; and if I could find John Silver, I do not doubt but within two days to arrest Hext for suspicion of felony." It was adjudged, that for the first part of the words, "for my ground in Allerton, Hext seeks my life," no action lay, for two reasons;—1st. because he may seek his life lawfully and upon just cause, and his land may be held of him. 2dly. Seeking of his life is too general; and for seeking only no punishment is inflicted by law.—But for the latter words, it was adjudged, that the action lay; because for suspicion of felony he shall be imprisoned, and his life drawn in question.

The defendant hearing that his father's barns were burnt, said (*o*), "I cannot imagine who should do it but the Lord Stourton," and the words were held to be actionable.

An action lies for publishing of the plaintiff, "I (*p*) think, or I dreamed, he committed a certain felony;" for although the words be not directly affirmative, the plaintiff may, by reason of them, be arrested upon suspicion of having committed that felony.

The defendant said, "He (*q*) is infected of the robbery and murder lately committed, and doth

(*o*) Mo. 142. 1 Vin. Ab. 435. pl. 13.

(*p*) *Smith v. Wisdom*, Cro. Eliz. 348. 6 Bac. Ab. 227.

(*q*) 1 Vin. Ab. 435.

smell of the murder ;” and the plaintiff had judgment, after long deliberation and argument ; and this decision was cited and approved of in a number of subsequent cases (*r*).

So for the words, “ I (*s*) am thoroughly convinced that you are guilty,” &c. for “ I am thoroughly convinced,” is equal to a positive averment : a man only avers a thing because he is convinced of the truth of it.

So for the words, “ If (*t*) thou hadst thy rights, thou hadst been hanged for such a felony,” an action lies.

But words of mere suspicion or opinion, and which do not directly or indirectly impute any act, are not actionable (*u*). In a late case (*x*)

(*r*) 3 Bulst. 249. God. 90. Hutt. 58. Cart. 214.

(*s*) *Peake v. Oldham*, Cowp. 275. (t) Brownl. 3.

(*u*) Com. Dig. Action on the case for defamation, F. 13. and per Holroyd, J. in *Hodgson v. Scarlett*, 1 B. A. 243. Thus it has been held, that for the words, “ He deserves to be hanged,” no action lies. 1 Rol. 43. l. 10. 15. So no action lies for the words, “ I count thee to be a witch.” 1 Roll. 46. l. 35. So it was held, that no action lay for saying, “ I will prove thee to be a thief ; I will prove it by thy son, or send him to the devil ;” for (as was said) the last words denote his doubt. Cro. J. 214. The last decision seems to be of very dubious authority ; for the first part of the words, I will prove thee to be a thief, clearly denote that an act was meant to be imputed, and the latter words merely import that the fact was within the knowledge of the son, who would place

where the defendant said of the plaintiff, "I will take him to Bow Street, on a charge of felony;" (innuendo, that the plaintiff had been and was guilty of forgery;) it was held that the words were not actionable, as they charged, not that he was a felon, but only suspicion of felony. And the cases of *Wood v. Merrick* (y), and *Pollard v. Mason* (z), were cited by Gibbs, C. J. where it was held that the words should affirm the plaintiff to be a felon: that a mere assertion that the defendant charged him on suspicion of felony was not of itself actionable.

But yet it is difficult to say that an imputation of a crime may not be most effectually conveyed by such an assertion, and if so, the case embraces all the mischief consequent upon the most direct allegation (a).

himself in jeopardy by absolving the father. And see the cases cited below, as to adjective words, &c. p. 71.

(z) *Harrison v. King*, 4 Price, 46. In the Exchequer Chamber, on a writ of error brought.

(y) Roll. Ab. p. 73. pl. 21. l. 50.

(z) Ib. Hob. 381.

(a) In the case of *Davis v. Noah*, 1 Starkie's, C. 377. where the declaration, in an action for a malicious prosecution, alleged that the defendant charged the plaintiff with felony, it was held to be supported by evidence, that the defendant stated to the magistrate that he had been robbed of specific articles, and that he suspected and believed, and had reason to suspect and believe, that the plaintiff had stolen them. Per Lord Ellenborough, C. J. and Abbott and Holroyd, Js.

It seems to be properly a question for the jury, whether the defendant, though he used words of suspicion only, did not mean, in effect, to impute the substantive crime to the plaintiff. In the case of *Tempest v. Chambers* (b), it appeared that the defendant, having obtained a warrant for the apprehension of the plaintiff, (which had been improperly issued upon an information before the magistrate of facts which amounted to no more than a mere trespass,) on meeting Salmon, an agent of the plaintiff's, said, "I have got a warrant for Tempest, I will advertise a reward of twenty guineas to apprehend him; I shall transport him for felony." And Lord Ellenborough left it to the jury to say whether the defendant was speaking with reference to the warrant which had been imprudently issued, or he meant substantively to impute a charge of felony. The jury found for the plaintiff.

It is observable that the cases of *Wood v. Merrick*, and of *Pollard v. Mason*, which were cited as conclusive authorities, in the Exchequer Chamber, in the case of *Harrison v. King*, can

*Bayley, J. dissent. 1 Starkie's C. 377.* But note that Mr. J. Bayley differed from the rest of the court merely on the point of variance, and not upon the general question, whether a malicious charge, though of suspicion only, was actionable.

(b) 1 Starkie's, C. 67.

scarcely be regarded as authorities at this day. The words in the former case were, "I charge you with felony;" in the latter, "I charge him with felony, in taking money out of the pocket of J. S." In common understanding, the defendant would be taken to assert, in the former case, that the plaintiff was guilty of felony; in the latter, that he had actually taken money out of the pocket of J. S. feloniously: the words, I charge you with such a fact, naturally import not merely that the fact is true, but that the speaker is so convinced of its truth, that he ventures to act upon it by making a deliberate charge.

From words of *comparison*. The defendant said, "You (c) are as great a rogue as J. S., who stole quilts!"

So for saying, "Thou (d) art as arrant a thief as any in England," an action lies.

So for the words, "As (e) sure as God governs the world, and King James this kingdom, J. N. hath committed treason."

From words of *hearsay*. As where the defendant said, "A (f) woman told me that she heard one say, that Meggs, his wife, had poisoned

(c) *Upton v. Pinfold*, Com. 267. (d) Cro. J. 687.

(e) Sid. 53.

(f) Golds. 139. Mo. 408. Cro. E. 645.

Griffin, her first husband, in a mess of milk." And in case of words so spoken, it seems to be immaterial whether the speaker really heard the words or not; unless (*g*), as will afterwards be seen, at the time of repeating them he afford the plaintiff a cause of action against the original author.

From words of *interrogation* (*h*). As where the defendant said, "When (*i*) wilt thou bring home the nine sheep thou stolest from J. N.?"

So an action lies for saying, "Did (*k*) you hear that J. S. is guilty of treason?"

A. (*l*) the wife of B. was asked by C. "Wherefore will your husband hang J. S.?" She answered, "For breaking our house in the night, and stealing our goods." The words were held to be actionable, for though they were spoken in answer to a question, they amount to a charge of stealing goods.

The defendant published the following advertisement:—"This (*m*) is to request, that if any

(*g*) *Woolnoth v. Meadows*, 5 East, 463. Cro. J. 162. 406.

(*h*) For words of interrogation in general, see Mo. 418. pl. 573. 2 Rol. Rep. 165. Palm. 66. 12 Rep. 134. Cro. J. 422. Keb. 359. pl. 52.

(*i*) *Hunt v. Thimblethorpe*, Mo. 418. 1 Vin. Ab. 429.

(*k*) *Earl of Northampton's case*, 12 Rep. 134.

(*l*) *Hayward v. Naylor*, 1 Rol. Abr. 50.

(*m*) *Delany v. Jones*, 4 Esp. C. 191.



printer or other person can ascertain that James Delany, Esquire (the plaintiff), some years since residing at Cork, late Lieutenant in the North Lincoln Militia, was married previous to nine o'clock in the morning of the 10th of August, 1799, they will give notice, &c., and receive the reward." And it was left by Lord Ellenborough, C. J. to the jury to say whether the advertisement imputed a charge of bigamy to the plaintiff.

So where the words are spoken by way of *exclamation*: as, "That (n) perjured villain!"

From *disjunctive words*. It has been said that, where two charges are made disjunctively, one of which is actionable and the other not, no action lies. The defendant said, "Thou (o) hast stolen my mare, or didst consent to the stealing of her." It was held, that the action was not maintainable, on account of the latter words. And so where a charge was imputed in the alternative; as where the defendant said, "Sparkham did steal a mare, or else Godwin is forsworn!" Although it was averred that Godwin never did swear any such matter, the charge was held to be too indirect to bear an action.

In the case of *Stirley (p) v. Hill*, the words were, "Thy brother was whipped about Taunton

(n) Roll. Ab. 76. (o) Cro. Eliz. 780. (p) Cro. Car. 283.

Cross, for stealing sheep ; *or* burned in the hand or shoulder." And the court, after verdict for the plaintiff, were of opinion, that the words did not import any certain slander.

These decisions, however, can scarcely be considered as precedents at this day, for it is clear that a charge of felony may be completely conveyed by such disjunctive imputations ; and were they not actionable, the legal consequences of slandering might in every case be easily avoided.

The same objection once prevailed, where the person and not the act was stated in the disjunctive.

The defendant said, "She (*q*) had a child, and either she or somebody else made away with it!" And three justices against the opinion of Bridgman, C. J. adjudged, that the words were not actionable. But in a subsequent (*r*) case this decision was overruled ; and upon the same principle, no doubt, it would now be held, that words imputing a criminal act in the disjunctive, are also actionable.

From *adjective* words. Where the words impute inclination only, they are not actionable ; as to say, "J. (*s*) S. is a murderous villain!"

(*q*) Cart. 55, 56.

(*r*) *Harrison v. Thornborough*, 10 Mod. 196.

(*s*) Ld. Ray. 236.

But where the participle is used, it is otherwise ; as to say, " J. (*t*) S. is a murdering villain !" The words in the former case importing an inclination only, in the latter an act done. So the words, " Dr. (*u*) Sybthorp is robbing the church," were held to be actionable ; and to say such a person is robbing such a man, or ravishing such a woman, is actionable.

So, " Where is that long shag-haired, murdering, rogue ?" was held to be actionable (*x*).

For the words, " Traitorous knave," an action has been held to be maintainable, though not for the words, " Rebellious knave;" and perhaps this distinction may even now be considered as good law, although many of the nice subtleties which were formerly in fashion are now disregarded ; since, though traitorous be a mere adjective, not implying any act, yet the consideration that the offence frequently consists in intention only, may well constitute this case an exception (*y*) to the general rule.

It is laid down by Sir Edward Coke (*z*), that sometimes adjective words will maintain an action, and sometimes not. They are actionable,

1. When the adjective presumes an act committed.

(*t*) Cro. Car. 318.

(*u*) 1 Rol. Ab. 76.

(*x*) Cro. Car. 318. Jo. 326.

(*y*) Cro. Eliz. 171. Lev. 90.

(*z*) 4 Co. 19.

2. When they scandalize a person in his office or function, or trade, by which he gets his living. As if a man says, "That one is a perjured knave!" There must be an act done, for otherwise he cannot be perjured. The words, "seditious (*a*) and thievish knave," have been held not actionable.

And the distinction has been frequently taken, that "thieving rogue," imports an act; "thievish rogue (*b*)," an inclination only.

So for the words, "You (*c*) are no thief!" an action lies, if they be spoken ironically.

And next, the imputation of an act may be inferred from any statement, which virtually includes or assumes the commission of the principal act, or a strong suspicion of it.

The defendant said, "I (*d*) could prove J. S. perjured, if I would!" and the words were held to be actionable; for, if true, J. S. must have committed an act of perjury.

So where the defendant said, "Thou (*e*) art a rogue, a runaway rogue, and didst run away from Oxford; and thou art a rogue of record." The words were held to be actionable; for if

(*a*) 4 Rep. 19. Cro. J. 65, 66. 2 Bulst. 138. Ld. Ray. 236.

(*b*) *Dorrell v. Grove*, Freem. 279.

(*c*) 1 Vin. Ab. 430, pl. 8.

(*d*) 1 Vin. Ab. 406, pl. 2.

(*e*) Sty. 220. 1 Vin. Ab. 415.

true, the plaintiff must have been convicted of record.

The defendant said to the plaintiff, "In (f) Blackbull Yard you could procure broad money for gold, and clip it when you had so done." It was objected, that the words were not actionable, for they merely imputed a *power*, and not an *act*. But the court held, that the limitation to place implied an act; for that, if a power alone had been meant to be imputed, the limitation to place would have been unnecessary—a power to do being the same in all places.

So in *Horne v. Powell* (g). The defendant said, "You may well spend money at law, for you can coin money out of halfpence and farthings!" It was held, that the words were actionable, and implying an *act*; for by a *mere power*, the plaintiff could never be able to spend money at law.

The defendant said of the plaintiff, "He (h) was put in the round-house, for stealing ducks at Crowland;" and judgment was given for the plaintiff. For though the court were at first of opinion, that they were bound by former authorities, and that if judgment were to be given for the plaintiff, many actions would arise at every

(f) Salk. 697. *Speed v. Parry*.

(g) Salk. 697.

(h) *Beavor Hides*, 2 Wils. 300.

assizes in the kingdom, where the common topic of conversation is, that such a man was sent to gaol for such a crime; yet, afterwards, they changed their opinion, and held, that the jury having found the words to have been falsely spoken, they clearly imported that the plaintiff had been guilty of a crime: that the objection was, that the words did not expressly allege that the plaintiff had stolen the ducks, but that words must be taken according to common parlance.

And so in a number of other cases, the asserting the plaintiff to have been confined or punished (i) for a certain offence, has been held to be actionable, for the imputation, at all events, throws strong suspicion upon him.

So where the defendant said, "He (k) is under a charge of prosecution for perjury; G. W. had the Attorney-General's instructions to prosecute." It was held that the words were actionable, as being calculated to convey the imputation of perjury.

So where the defendant said of the plaintiff, "His (l) character is infamous: he would be disgraceful to any society. Whoever proposed him must have intended it as an insult; I will pur-

(i) Cro. J. 247.

(k) *Roberts v. Camden*, 9 East, 93.

(l) *Woolnoth v. Meadows*, 5 East, 463.

sue him and hunt him from all society. If his name is enrolled in the Royal Academy, I will cause it to be erased, and will not leave a stone unturned to publish his shame and infamy. Delicacy forbids me from bringing a direct charge; but it was a male child of nine years old who complained to me."

So where the defendant said, "I (*m*) dealt not so unkindly with you, when you stole my stack of corn."

The defendant said to a husband in London, "You (*n*) are a cuckoldy old rogue!" and the words were held to be actionable, for they imply, that the wife is a whore, for which, by the custom of the city, she is liable to temporal punishment.

Words imputing *intention* only to commit crime, are not actionable of themselves, unless in the case where the intention is of a treasonable nature (*o*).

As, if one say to another, "Thou (*p*) wouldst have killed me," no action lies.

(*m*) *Cooper v. Hawkswell*, 2 Mod. 58. (*n*) 1 Str. 471.

(*o*) Cro. J. 407. "To impute evil inclinations to a man, which were never brought into action, is not actionable. Words, to be actionable, should be unequivocally so." Per Lord Ellenborough, C. J. in *Harrison v. Stratton*, 4 Esp. C. 218.

(*p*) *Dr. Poe's case*, cited by Coke and Haughton, 2 Buls. 206. 1 Vin. Ab. 440.

So for the words, "She (*q*) would have cut her husband's throat, and did attempt it," an action lies; because an attempt, that is an act, is charged; but in the same case it was held, that for the first words, "she would have cut her husband's throat," no action could be maintained.

2dly. Where the act charged is, in legal strictness, impossible.

Where a criminal charge is conveyed by the defendant's expressions, the liability to make reparation cannot be effected by any impropriety in the terms of the communication, whether legal or grammatical; for the loss of character, and its probable consequences, constitute the ground of action, without reference to the means employed. The contrary doctrine, indeed, at one time, prevailed.

It has been holden, that if a married woman say, "You (*r*) have stolen *my* goods," the words are not actionable, the words being repugnant; for as a married woman cannot have goods of her own, she cannot be robbed of any.

But in *Charnel's* case (*s*), which was earlier than the preceding, the wife said, "*My* turkeys are stolen, and Charnel hath stolen them;" and

(*q*) Lane, 98. 1 Vin. Ab. 440. pl. 9.

(*r*) 1 Roll. Ab. 74. 6 Bac. Ab. 238.

(*s*) Cro. Eliz. 279.



the same objection being made in arrest of judgment, the court said, "The wife did charge the plaintiff with stealing her turkeys; and if a person who had no horse were to publish these words, 'J. S. hath stolen *my* horse,' the discredit would be as great to J. S. as if the publisher had had a horse; for every person who heareth the words may not know whether he had a horse or no." And in the subsequent case of *Stamp (t) v. White*, the defendant's wife said, "Thou art a thievish rogue, for thou hast stolen *my* faggots!" Although it was objected that the words were without meaning; for a married woman could not have property of her own, yet it was held, that the words were actionable; and it was to be understood according to common intendment, that the defendant charged the plaintiff with stealing *her husband's* faggots.

So where the defendant said, "These (u) guineas are Mr. Bendish's (the plaintiff's), and were given me to vote for him." It was urged, on motion in arrest of judgment, that the words are insensible; for that when the plaintiff has given money to the defendant, it cannot be the plaintiff's money; but judgment was given for the plaintiff.

The older cases, indeed, carried the doctrine of repugnancy to a very unreasonable extent; and

(t) Cro. Jac. 600.

(u) 11 Mod. 174.

the courts arrested judgments, not only on the ground that an actual inconsistency appeared on the face of the record, but even where no inconsistency appeared, because such might by possibility exist.

The rule, however, seems to be now established, that no inconsistency or grammatical impropriety will prevent the words from being actionable, where the intention to charge the plaintiff with the commission of a crime plainly appears.

II. The CRIMINAL QUALITY of the matter charged must appear with certainty.

This may appear,

1st. From the use of general terms of known legal import.

2dly. From circumstances explaining the meaning of terms otherwise doubtful, or innocent.

3dly. From the mere description of the circumstances constituting the offence.

1st. From the use of terms of known legal import.

It seems at one time to have been understood that no charge was actionable, when conveyed in terms, which did not particularize the circumstances of the offence. So that to say a man was "a traitor (x), or a thief," did not afford him a ground

of action, unless he had sustained special damage from the words. And to such an extent was the nicety carried, that even cases where the words did state some of the circumstances, it was held to be incumbent on the plaintiff to prove that facts connected with the charge were partially true, in order to render it the more probable that he might have been placed in jeopardy by the accusation. And this affords reason to suppose that, originally, the only ground of allowing such an action, without proof of special damage, was, the danger to which the party was exposed of a criminal prosecution, to which he could scarcely have been subjected by a bare general charge, unsupported by any facts or circumstances which might give it colour (x).

Thus, in the case of *Jacob (y) v. Mills*. It was held, that for the words, "He hath poisoned J. S. and it shall cost me 100*l.* but I will hang him," no action was maintainable, because the plaintiff did not aver (and of course prove) that *J. S. was dead* at the time the words were spoken.

The defendant said, "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved

(x) It seems that formerly slander was not actionable, unless it occasioned special damage or affected the life of the party. 2 Vent. 28.

(y) Cro. J. 331. 343. 1 Vent. 117.

his head; the one part lay on the one shoulder, and another part on the other." After verdict for the plaintiff, judgment was arrested, upon the ground that it did not appear that the cook was killed.

But in other cases, both prior and subsequent to the former, similar objections were overruled. In the case of *Webb (x) v. Poor*, the words were, "I will call him in question for poisoning my aunt, and I make no doubt to prove it." It was moved in arrest of judgment, that the plaintiff had not averred that his aunt was poisoned; but the court would not allow the objection, saying, that the plaintiff's credit was impeached, whether she was poisoned or not. And the same point was ruled in *Talbot (a) v. Case*, where it was said, that the death of the person alleged to have been murdered would be intended, unless the contrary appeared. Still, however, it was held, that if it appeared that the person said to have been murdered was in fact living, no action could be maintained. The plaintiff (*b*) showed in his declaration, that the defendant had a wife yet living; and that he said of the plaintiff, "Thou hast killed my wife; thou art a traitor!" and it was held that no action lay; and

(z) Cro. Eliz. 569.

(a) Cro. Eliz. 823.

(b) *Snagg v. Gee*, 4 Rep. 16. 9. Cro. Car. 489.

a distinction was taken between the case where the person stated to have been murdered was still alive, and where he was dead ; that, the wife being alive, no action lies, although the defendant says that the plaintiff has murdered her ; since it appears that no murder of her can have been committed nor the plaintiff in any jeopardy : and so the words are vain, and no scandal or damage to the plaintiff.

To require the plaintiff to prove, that the party, with whose murder he is charged, is actually dead, would be highly unreasonable and inexpedient ; since the slanderer might secure impunity by fixing either upon a fictitious person as the supposed victim of the murder, or upon some real person whose death the plaintiff might not be able to prove.

In the case of *Snag v. Gee*, (cited by Sir E. Coke (c), in his fourth report,) it appeared upon the record, that the wife, alleged to have been murdered, was still alive ; and the action was held not to be maintainable, because the plaintiff was not put in jeopardy by the words.

It cannot, however, fairly be inferred from this, that the plaintiff is in all cases precluded from recovering, although the person, alleged to have been murdered, should be still alive ; since

the plaintiff's life, or liberty at least, may have been placed in jeopardy in consequence of the injurious report, though, in fact, at the time of pleading, or upon the trial, the defendant may be able to prove the person alleged to have been murdered to be still living. The words, if actionable without special damage, must be so immediately when spoken; and their actionable quality must then depend upon the fact, whether the hearers were aware that the person alleged to be murdered was really alive; if they did not know the fact, then all the consequences (the probability of which renders a charge of murder in any case actionable) may follow; since, unfortunately, several melancholy instances may be cited where an accused person has suffered for the supposed murder of one who survived him.

Should it, however, precisely appear, upon the plaintiff's own statement, that the person charged to have been murdered was alive when the words were spoken, it would probably be presumed that the hearers knew that fact.

The plaintiff(*d*) declared that the defendant said of him, "He is a base gentleman, and had three or four children by A. S. his maid servant; and after killed them, or caused them to be

(*d*) 1 Vin. Ab. 409. pl. 4. Foph. 187. Jo. 141. Lat. 159. Cart. 55. Comb. 132.

killed;" and then averred, that he never was guilty of any incontinency with A. S. nor any other, nor of any such felony or murder. After verdict for the plaintiff, it was objected, in arrest of judgment, that inasmuch as he had averred that he never was guilty of any incontinency with A. S. it was all one as if he had averred that he never had any child by A. S. and that if he had so averred, no action would lie; for then it would appear to the court, that there was no such thing in *rerum natura* as is supposed to have been killed. But it was adjudged for the plaintiff; because it was not *specifically averred* that he had no child by A. S. but only generally, that he was not incontinent with her.

And the like degree of particularity has been required in other cases where felony has been charged.

Thus, for the words, "Thou (*e*) hast committed burglary in breaking his house, and taking his goods." It was held, that no action was maintainable; it being uncertain, as no person was named, whose house and goods were meant. And, upon the same principle, it was held, that a general charge of forgery (*f*) was not actionable, without reference to some particular deed,

(*e*) *Brown v. St. John*, 1 Rol. Ab. 71.

(*f*) 3 Leon. 231.

instrument, or other subject matter. So it was held, that a general charge of subornation (*g*) of perjury was not actionable, unless it appeared that the perjury had been committed.

These doctrines have, however, been long exploded; and the rule seems now to be perfectly established, that an action is maintainable for *a general imputation conveyed in apt terms*.

The establishment of this rule necessarily defeated another nicety, which has been alluded to as having formerly been countenanced by the courts, namely, that when the charge described any circumstances of the offence, it was incumbent upon the plaintiff to show the existence of such particulars as might serve to give colour to the defendant's imputation, since it would be absurd to allow a remedy against general charges where no colour could be shown, and to deny it where the imputation was equally prejudicial, because it contained particulars, which particulars the plaintiff might be equally unable to prove.

As for instance, if for the words, "you committed a murder," the plaintiff be entitled to recover, it would be highly unreasonable in an action for the words, "You murdered J. S." to require him to prove that such a person as J. S. had existed, but was dead at the time the words were spoken.

(*g*) 6 Mod. 200.



It may next be proper to refer to a few cases where general words have been held to be actionable.

An action has been held to be maintainable for the words traitor (*h*), murderer (*i*), thief (*k*), sheep-stealer (*l*).

For charging another with felony (*m*), perjury (*n*), subornation of perjury (*o*), forgery (*p*), robbery (*q*):

It was once held, that to call another a pick-pocket (*r*), did not amount to a charge of felony; this decision has, however, been overruled (*s*).

Whilst the statutes against witchcraft remained in force, it seems that the term witch was not actionable, unless it was coupled with some act of witchcraft: the cases, however, relating to this

(*h*) Dal. 17. Bro. Ac. sur le Cas. pl. 2. 27 H. 8. 14.

(*i*) Mo. 29.

(*k*) But the term *thief* will not be actionable, if it appear from the context that it was not used in a felonious sense. Should this appear on the plaintiff's own showing, he would be nonsuited. See *Thompson v. Bernard*, 1 Camp. 48. *Christie v. Powell*, Peake's C. 4. Otherwise it will be incumbent on the defendant to show that the word was not used in a felonious sense. Vide *infra*, *Evidence in Defence*.

(*l*) 3 Buls. 303.

(*m*) Jo. 32, Cro. Car. 276. Poph. 210. Sty. 235.

(*n*) Ow. 62. Noy, 61. 1 Vin. Ab. 405.

(*o*) Cro. Eliz. 308. Cro. J. 158. 1 Rol. Ab. 41.

(*p*) *Jones v. Herne*, 2 Wils. 87.

(*q*) Cro. J. 247. (*r*) 3 Salk. 325. (*s*) 11 Mod. 255.

offence, are so inconsistent with each other, and with any settled principle, as to appear incapable of affording any illustration of the subject of this treatise.

To charge one with having *cozened* another, has, in a great number of cases, been held to be too indefinite to support an action. The defendant said, "Thou (*t*) art a cozening knave, and hast cozened me out of 500*l*." and it was held that no action lay.

So to accuse (*z*) another of cheating is too general to support an action.

So to say, he (*x*) is a rogue, varlet, or the like, is not actionable.—So to say, "Thou (*y*) art a common filcher, a companion of cut-throats," &c.

So to say, "He (*z*) is a bloodsucker, and not fit to live in the commonwealth; and his child, not born, is bound to curse him."

2dly. The *criminal quality* of the act imputed may appear from circumstances explaining the meaning of words otherwise doubtful or innocent.

In consideration of law, that is certain which can be rendered: it is, therefore, of no importance whether the terms used be doubtful, or even

(*t*) Hutt. 13. 1 Vin. Ab. 427. pl. 9. 3 Lev. 171. Cro. Eliz. 95 Ow. 47. Buls. 172. Show. 181. God. 284. Cro. J. 427.

(*u*) 2 Salk. 694. (*x*) 4 Rep. 15. b. Ld. Ray. 1417.

(*y*) Cro. Eliz. 554. (*z*) Noy, 64.

apparently innocent, provided it can be shown that they could and did convey the offensive meaning which forms the ground of complaint.

An imputation of being *forsworn* is the most common instance of cases falling under this division, and has given rise to a numerous class of decisions.

It has been held, that to accuse another of having forsworn himself, generally, is actionable (*a*); but it seems to be now perfectly settled, that the term is not actionable, unless it appear from the accompanying circumstances to have been meant and understood of such a forswearing as would constitute the offence of perjury (*b*).

Thus, to say (*c*), "A. B. being forsworn, compounded the prosecution," is actionable, for an indictable forswearing must have been intended.

So the term "forsworn" is actionable when reference is made to a court (*d*) in which false swearing would amount to perjury.

The defendant said, "Arthur (*e*) Colome is a forsworn man, and hath taken a false oath in his deposition at Tiverton, where he waged his law against me;" and the plaintiff had judgment, the

(*a*) 2 Buls. 40.

(*b*) 4 Rep. 15. 2 Buls. 150. *Holt v. Scholefield*, 6 T. R. 691.

(*c*) Cro. Eliz. 609. 2 Rol. Rep. 410.

(*d*) Cro. Eliz. 720. 1 Vin. Ab. 406. pl. b. 7.

(*e*) Cro. J. 204.

forswearing appearing by the description to have amounted to perjury.

So to say, "Thou wert forsworn at such a trial (*f*)," (with reference to a trial where the offence of perjury might have been committed) is actionable.

Where reference is made to a particular court, the imputation is actionable, if perjury could have been committed there. In such case, however, it is incumbent on the plaintiff to show that the perjury could have been committed there.

The defendant said, "Thou (*g*) wert forsworn at Whitechurch court," and the words were held not to be actionable, because it did not appear that Whitechurch court was a court of record.

So it was held, that no action lay for saying, "He (*h*) has forsworn himself in Leake court," without shewing it to be a court which could compel the taking of an oath.

It is not necessary that the forswearing should be shown to have been intended of a perjury within the statute of Elizabeth, for perjury is an offence punishable at Common Law (*i*).

So, although Ecclesiastical Courts are not

(*f*) Cro. Car. 378. Lut. 1292.

(*g*) Cro. Car. 378.

(*h*) 1 Rol. Ab. 39. pl. 7. 6 Bac. Ab. 207.

(*i*) 1 Rol. Ab. 49.

mentioned in the statute of Elizabeth against perjury, yet an action lies for imputing a forswearing in an Ecclesiastical Court. The defendant said, "Thou (*i*) art a forsworn knave, and I will prove thee to be forsworn in the Spiritual Court;" and it was held that the action well lay; for the Ecclesiastical Court is a judicial court, and well known (*k*).

To say, "Thou (*l*) wast forsworn before my Lord Chief Justice, in evidence," is actionable.

So to say that another is forsworn before a Justice (*m*) of the Peace is actionable; or before such a person, naming him, provided it can be shown with certainty, that the person so named was a Justice of the Peace.

The defendant said, "Thou (*n*) art a forsworn knave!" The plaintiff asked, "Where?" The defendant replied, "In Ilston court;" and the words were held to be actionable, the court alluded to being a Court-Lest, where the offence might have been committed.

"Thou (*o*) art a forsworn man; I will teach

(*i*) *Shaw v. Thompson*, Cro. Eliz. 609.

(*k*) But it has been held in a late case, that an indictment does not lie in respect of a false oath before a surrogate. *R. v. Foster*. Russ. and Ry. C. C. R. 459. But now see the Stat. 4 G. 4. c. 76. s. 14.

(*l*) Le. 127.

(*m*) *Gurneth v. Derry*, 3 Lev. 166. 4 Co. 17.

(*n*) Cro. Eliz. 720.

(*o*) 1 Vin. Ab. 407. pl. 11.

thee the price of an oath, and will set thee on the pillory." And the words were held to be actionable, because the defendant showed that he meant to impute a perjury, for which the plaintiff ought to stand in the pillory.

The injurious import of the term *stealing*, has undergone much discussion.

In *Baker (p) v. Pierce*. The words were, "You stole my boxwood, and I will prove it." Upon motion in arrest in judgment, a long string of cases was cited for the defendant, in which the term stealing had not been considered as actionable; as where the defendant said, "You (*q*) are a thief, and stole my timber." "You (*r*) are a thief, and stole my corn, hops, and apples." "You (*s*) stole timber out of my yard." "You (*t*) stole corn out of yard." All of which had been decided upon the ground, that unless the additional words show that a charge of felony was intended, they are to be taken in their mildest acceptation.

For the plaintiff, it was contended, that, "You have stolen my *timber*," is actionable; for it must be felled and severed from the stock, before

(*p*) 6 Mod. 23.

(*q*) Cro. J. 65.

(*r*) 2 Brownl. 280.

(*s*) Cro. J. 673. All. 31. Hob. 331. Sty. 231.

(*t*) Hob. 406.

it is timber, according to the distinction made in the old hexameter :—

“Arbor dum crescit, lignum dum crescere nescit (t).”

Holt, C. J. said, “The opinions of later times have been in many instances different from those of former days in relation to words ; for formerly there has been a difference taken between saying, “Thou art a thief, *and* hast stolen my wood ;’ and, “Thou art a thief, *for* thou hast stolen my wood.” And judgments have gone both ways ; but later opinions make no difference if the words be spoken at the same time. And these are scrambling things that have gone backwards and forwards, and the idle people in the country, that privately cut and carry away coppice wood, are in common parlance, called “woodstealers.” And he said, that, “Stealing, and feloniously stealing, are not the same ; for in common parlance, stealing does not always import ‘felony ;’ as, to cut and carry away furze is a stealing, but not a felonious stealing.”

But Powell, J. said, he always took it, that stealing, *ex vi termini*, did import felony. And afterwards, by the opinion of the whole court, the plaintiff had judgment, on the ground, as stated in the report, of all the later authorities (u).

(t) 1 Rol. Ab. 70. pl. 47.

(u) 6 Mod. 23.

From this, and the later decisions upon this subject, it seems, that the term stealing takes its complexion from the subject matter to which it is applied, and will be considered as intended of a felonious stealing, if a felony could have been committed of such subject matter.

In modern construction and practice little doubt can arise upon these niceties which appear in former times to have afforded abundant occupation to the courts. If, from the plaintiff's declaration, it appear, that the charge of stealing could not, from its application, have been meant to impute a felonious stealing: as if, for example, the defendant had said, "You stole an acre of my land;" the statement would be held to be bad upon demurrer; if it appeared upon the trial that the term had been applied in a sense not felonious, the plaintiff would be nonsuited; and, finally, if after verdict for the plaintiff, it appeared, that the term as used was *capable* of a felonious sense, the verdict would be supported.

This doctrine is applicable to every other case where doubtful words, or even those apparently innocent, derive a criminal quality, either from context or collateral circumstances.

The defendant said, "Thou (*x*) art a clipper,

(*x*) *Walter v. Beaver*, 3 Lev. 166. 2 Jo. 235. Cro. J. 255. 276. 1 Lev. 155.



and shall be hanged for it ;” and the court, after a verdict for the plaintiff, said, that the words should not be taken to mean a clipping of clothes, but a clipping of money, for which the plaintiff might be hanged.

So for the words, “Thou (*y*) art a clipper, and thy neck shall pay for it,” an action was held to be maintainable; for by the subsequent words it could not be intended of any other clipping than of money.

So when the statutes against witchcraft were in force, the defendant said, “Thou (*z*) art a witch, and I will make thee suffer for a witch.” After verdict for the plaintiff, it was contended, that the words were not actionable; that it had been many times adjudged that *witch* alone is not actionable; and that, “I will make thee suffer for a *witch*,” are not; for it is not said suffer death; that it might be intended of a citation in the Spiritual Court, which was the usual way before the statute; or it might be by ducking in the water as the common people used to try those suspected of witchcraft. But it was answered by Rokesby and Neville, Justices, that the words shall be taken as they are usually understood among neighbours in the country; to suffer is intended to suffer death; as they usually

(*y*) 3 Lev. 166.

(*z*) 3 Lev. 394.

say, How many suffer at this Assizes? which is intended, suffer death. And thereto Treby, C. J. after it had been twice moved, inclined. And at last judgment was given for the plaintiff by Treby, C. J., and Rokesby and Neville, Js.; Powell, J. being of a contrary opinion, because words shall be taken in *mitiori sensu*, and the word suffer is wholly uncertain what manner of suffering was intended.

The defendant (a), speaking of the death of one Daniel Dolly, said to the plaintiff, "You are a bad man, and I am thoroughly convinced that you are guilty; and rather than you should want a hangman, I would be your executioner." After verdict and judgment for the plaintiff, the defendant brought a writ of error in the court of King's Bench, assigning as two grounds of error,—

1st. That the words were not in themselves scandalous.

2dly. That they did not become so by reference to the death of D. D.

Lord Mansfield, in affirming the judgment, observed, "It is argued that there are many innocent ways by which one man may occasion the death of another; therefore, the words, 'guilty of the death,' do not in themselves necessarily

(a) *Peake v. Oldham*, Cowp. 275.

import a charge of murder ; and consequently, as no particular act is charged (which in itself amounts to an imputation of a crime) the words are defectively laid. What ! when the defendant tells the plaintiff that he has been *guilty* of the death of a person, is not that a charge and imputation of a very foul and heinous kind ? Saying that such a one is the cause of another's death, as in the case in 2 Buls. 10, 11, is very different ; because a physician may be the cause of a man's death, and very innocently : but the word *guilty* implies a malicious intent, and can be applied only to something which is universally allowed to be a crime. But the defendant does not rest here : on the contrary, in order to explain his meaning, he goes on and says, ' and rather than you should be without a hangman, I will hang you.' These words plainly show what species of death the defendant meant, and therefore in themselves manifestly import a charge of murder."

Where the words merely charge the plaintiff with being *deserving of punishment*, great doubt seems to have been entertained whether they are actionable, and there are many authorities both ways.

It has been held, that an action lies for saying, "If (b) you had your deserts, you had been

(b) Cro. Eliz. 62.

hanged before now." For the court said, it should be intended to convey an imputation of an offence for which the penalty of death was due.

So the words, "He (*c*) hath deserved to have his ears nailed to the pillory," were adjudged to be actionable. But for the words, "Thou (*d*) art a scurvy bad fellow, and hast done that for which thou deservest to be hanged;" it was held, that no action could be maintained. So it has been held, that the words, "Thou (*e*) shouldest have sate on the pillory, if thou hadst thy deserts," were not actionable, because too general.

As a greater degree of precision has been required in modern times than formerly, the cases last cited may, perhaps, be considered as the better authorities.

If, however, the words import a conviction for some offence, it seems they are actionable.

The defendant said, "You (*f*) are a branded rogue, and have held up your hand at the bar."

It was held, that the words were actionable, since they imply that the plaintiff was branded according to the statute (*g*).

So words or signs *apparently innocent, or unintelligible*, may, by explanatory circumstances, become actionable. The defendant said of the

(*c*) Cro. Eliz. 384.

(*d*) 1 Vin. Ab. 415, pl. 5.

(*e*) 1 Vin. Ab. 415, pl. 10. Mo. 243.

(*f*) All. 35.

(*g*) 1 Ja. c. 7.

plaintiff, "He (*h*) is a healer of felons;" and the words having been spoken in one of the western counties, wherein "a healer of felons" signifies a concealer of felons, were, thus explained, held to be actionable.

So the words, "He (*i*) is mainsworn," were held to be actionable, as published in a part of the kingdom where they were understood to convey a charge of perjury.

So, generally, in regard to words spoken in a foreign language, the only question is, whether they were understood by the hearers in an actionable sense?—If so understood, the mischief is effected, and the cause of action complete (*k*).

Where the words are spoken in the Welsh language, but in an English county, it must appear, that the hearers understood Welsh; for otherwise the court will not intend that any there understood the Welsh tongue; and then it was not any slander any more than if any one spoke slanderous words in French or Italian, in which case no action will lie, unless it be averred, that some one there (*l*) understood the language in which the alleged slander was conveyed.

And as doubtful or apparently innocent words

(*h*) Hob. 126. Cro. Eliz. 250. Cart. 214.

(*i*) Hob. 126.

(*k*) 1 Roll. Ab. 74. Cro. Eliz. 496.

(*l*) Cro. Eliz. 865.

may, by circumstances, be shown to be actionable; so may words *apparently actionable* be explained, by circumstances, to have been intended and understood in an innocent sense. Thus, though the defendant should say, "Thou art a murtherer," the words would not be actionable, if the defendant could make it appear that he was conversing with the plaintiff concerning unlawful hunting, when the plaintiff confessed that he killed several hares with certain engines, upon which the defendant said, "Thou art a murtherer," meaning a murtherer of the hares so killed (*m*).

Formerly a distinction was taken between saying, "Thou art a thief, *for* thou hast stolen such a thing," as a tree, the taking of which could not be felonious, and the saying, "Thou art a thief, *and* hast stolen such a thing;" since in the former case the subsequent words show the reason of calling the plaintiff a thief, and that no felonious imputation was meant; but in the latter, the action lies for calling him a thief, and the addition "thou hast stolen," is another distinct sentence by itself, and not the reason of the former speech, nor any diminution thereof (*n*).

(*m*) 4 Co. 13.

(*n*) Cro. J. 114. B. L. N. P. 5. Hob. Rep. 106. Cro. Eliz. 857. Hob. 77. Brownl. 2. God. b. 241. Hard. 7. All. 31. Sty. 66.

Little stress, however, would probably be now laid upon this distinction, as, in common discourse, *and* is frequently intended to mean *for*.

And even in the construction of legal instruments, instances are not unfrequent, where the vulgar and obvious acceptation of the word has been preferred to its strict grammatical signification (*o*).

Brittridge brought an action for these words, "Mr. Brittridge is a perjured old knave, *and* that is to be proved by a stake parting the land of H. Martin and Mr. Wright." And upon motion in arrest of judgment, it was held, that although the words, "thou art a perjured knave," without any more, would have been actionable; yet, that upon all the words taken together, no action lay; for the latter words extenuate the former, and explain his intent, that he did not mean any judicial perjury; and therefore it was adjudged that the words were not actionable. But it was said, that if the plaintiff's counsel had disclosed the truth of the case in the declaration, the words would have maintained the action; for the truth of the case was, that in an action between Martin and Wright, the state of the controversy was, whether the stake stood upon the land of the one or the other, or indifferently as a boundary

between their lands. And in that action the plaintiff was sworn as a witness; and, by the pretence of the plaintiff, had perjured himself. But this special matter was not disclosed, and therefore it was decided for the defendant (*p*).

Sir Edward Coke, in his fourth report, observes, that, "In case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking of them; for, "*Sensus verborum ex causâ dicendi accipiendus est.*"

And again, "God forbid that a man's words should be, by strict and grammatical construction, taken by parcels against the manifest intent of the party, upon consideration of all the words which import the true cause and occasion, which manifest the true sense of them." This rule is so clear, and so well established, that any further illustration of it would be nugatory; and the questions which may arise, upon which party shall the *onus* of proving or disproving the injurious intention and meaning be imposed; and how shall the defendant best avail himself of explanatory circumstances in his favour; will be afterwards considered under more appropriate divisions.

3dly. From the mere description of the circumstances constituting the offence.

(*p*) 4 Co. 18. Yel. 10. 34. 2 Rol. Ab. 343. Mo. 666.



In the older cases, much difficulty prevailed with respect to the actionable quality of words which contained a mere enumeration of circumstances: it was frequently doubted, in the first place, whether the circumstances, supposing them to be true, constituted an indictable offence? in the second, whether the imputing such a misdemeanor was a sufficient ground of action?

The affirmative of the latter question has already been attempted to be shown. With respect to the first part, it may be proper to advance a few observations.

In considering the class of cases referable to this head, where offences have been charged not amounting to, but connected with, felony, it will be convenient to distribute them into imputations charging,

An *attempt* to commit a crime.

A *solicitation* to commit a crime.

Some *preparation* made in *contemplation* of the commission of a crime.

As to words charging an *attempt* to commit a crime.

In the case of *Sir (q) Harbert Croft v. Brown*, Coke, C. J. observed, that, in ancient time, "*voluntas reputabatur pro facto*;" and that if a

person lay in wait to kill another, and upon his resisting, wounded but did not kill him, it amounted to a felony at Common Law, and the offender was ousted of his clergy; the intention, manifested by an overt act, constituted a felony.

The learned judge then proceeded to intimate, that any words charging an overt act done in pursuance of a felonious intention, would be actionable. But that in the principal case, the words, "He keepeth men to rob me," were not actionable, since they did not charge any way-laying or overt act done.

But the words, "He (*r*) sought to murder me, and I can prove it," were held to be actionable.

In this case it may be observed, the words imported more than a mere inclination to murder; since the term *sought* is shown by the latter words to refer to some overt act capable of proof.

But for the words, "Thou (*s*) wouldest have killed me," it was held that no action lay, since intention only was charged.

In *Muney's* case (*t*), Coke, C. J. and Houghton, J. held that the words, "Thou art a knave,

(*r*) Cro. Eliz. 308.

(*s*) *Dr. Poe's* case, vid. 2 Buls. 206. 1 Vin. Ab. 440. pl. 9.

(*t*) 2 Buls. 206.

and hast laid in wait to kill me ; and thou hast hired one W. to kill me," were not actionable, because *no act* was laid to be done, but an intention only ; and that a mere intent is not punishable.

It is remarkable, that the lying in wait, and hiring an assassin to murder another, should be considered as nothing more than mere intention ; and this decision seems to be very inconsistent with the subsequent doctrine of Lord Coke in *Sir Herbert Croft's case* (u) ; notwithstanding therefore, this and some other contradictory authorities, it may be collected from a general view of the cases, that the charging any attempt to commit a felony is actionable, for such an attempt constitutes an indictable offence (x).

Where the words charge a *solicitation* to commit a crime.

The defendant said, "Mrs. Margaret Passie sent a letter to my Mr. and therein willed him to poison his wife." After judgment for the plaintiff, it was assigned for error, that the words were not actionable ; because they did not charge any act done ; and that it was not like charging the plaintiff with lying in wait to commit a murder ; but all the justices and barons, besides Kingsmill, held, that the action lay (y).

(u) 3 Buls. 167.

(x) 2 East; 6.

(y) Cro. Eliz. 747. cited by Williams, J. Buls. 201.

The defendant said, "Tibbot (z) and one Gough agreed to have hired a man to kill me." And judgment was given for the plaintiff by Wray, C. J. and Fenner, J. against the opinion of Gawdy.

The defendant said, "You (a) set on folks to murder J. S." And Wylde, J. conceived the words to be actionable, since the offence was indictable.

The defendant said, "John (b) Leversage would have robbed the house of J. S. if J. D. would have consented unto it. He persuaded J. D. unto it, and told him he would bring him where he should have money enough." And although it was objected in arrest of judgment, that the plaintiff could receive no prejudice from the words, which did not impute any act done, the plaintiff had judgment.

The defendant said, "He (c) bade J. S. to steal what goods he could; and he would receive them." And it was held, on motion in arrest of judgment, that the words were not actionable, since they merely charged the giving bad advice, and no act done.

But in *Lady Cockaine's* case (d). A charge of having solicited another to commit a felony,

(z) Cro. Eliz.

(a) *West v. Phillips*, Keb. 253.

(b) Cro. E. 710.

(c) 2 Jo. 157.

(d) Cro. E. 49.

was held to be actionable. And in *Sir Harbert Croft's* case (*e*) it was held, that to say, "A. did hire a man to rob me," would be actionable.

Where the words charge some *preparation* made in contemplation of the commission of a crime.

When a man does an act in itself indifferent, but in contemplation of the commission of a crime in future, (as the act is not indictable,) an imputation of it can scarcely be considered as actionable.—As if, for instance, a person were to purchase a pistol, with the intent to commit murder at a future opportunity, the act would not, in law, amount to an indictable offence, though it might be a good ground for binding the party to his good behaviour (*f*). It is to be observed, however, that in *Lady (g) Cockaine's* case, the words charging her with having solicited a pregnant woman to kill her child, were held to be actionable; because, if true, there was cause to bind her to *her good behaviour*. The words, however, in that case, were clearly actionable

(*e*) 3 Buls. 167. So per Grose, J. 2 East, 20. an action lies for charging the plaintiff with having solicited a servant to steal the goods of his master.

(*f*) But it has been held, that the procuring counterfeit coin, with intent to circulate it, is an indictable offence. *R. v. Fuller*, R. & M. C. C. 308.

(*g*) Cro. E. 49.

upon another ground, and the reason given is insufficient, since it appears, from a variety of decisions, that many imputations for which, if true, the party might be bound to his good behaviour, are not actionable.

The defendant said, "He (*h*) keepeth men to rob me." And it was held, that the words were not actionable.

After some conversation about robbing a house, the defendant said, "It (*i*) was T. M. (the plaintiff) and J. D. that were about to rob E. C.'s house." After verdict for the plaintiff, it was adjudged by Archer and Vaughan, J. for the defendant. And it was said, that the *going with the intent to lie in wait* to kill a man was not indictable; but that the *lying in wait* with the same intent was indictable.

Upon the whole it seems, that where the words merely impute an act done in contemplation of the future commission of a crime, they are not indictable, unless it appear that the defendant intended to charge the plaintiff with having solicited, or conspired with, others for the purpose of committing the crime.

Where the description of the circumstances is precise, little doubt can arise. The defendant said, "You (*k*) have caused this boy to perjure

himself." And the words were held to be actionable, since the facts charged constitute the offence of subornation of perjury.

- So where the defendant said, "You (*l*) have bought a roan stolen horse, knowing him to be stolen."

- The defendant said, "He (*m*) came to my door and set a pistol to my breast, and demanded money of me; and I, for safeguard of my life, gave him what money he desired." Roll. C. J. observed, if the words sound to charge him with felony, the action will lie; and three of the Justices decided for the plaintiff.

The defendant said of a justice of the peace and deputy lieutenant for the county of Warwick, "I have heard that a maid of J. K.'s should report, that he being sick and she looking through a hole of the door where he then lay; saw a priest (innuendo, a popish priest) give the eucharist and extreme unction to Sir J. K." It was moved in arrest of judgment, that these words did not amount to calling him a papist; since it did not appear that the priest was a popish priest, unless by an innuendo. But it was, after two arguments, resolved, that the words taken altogether were actionable, and explained one

(*l*) *Briggs's case*, God. 157.

(*m*) *Neve v. Cross*, Sty. 350.

another ; that a priest who gives the extreme unction must be a popish priest, and he that receives it a papist ; and the judgment given for the plaintiff in the Common Pleas, was afterwards affirmed in the King's Bench (n).

The defendant said, "Thou (o) didst violently, upon the highway, take my purse from me, and four shillings and two-pence in it ; and didst threaten me to cut me off in the midst, but I was forced to run away to save my life." And the words, which in fact amount to a description of a highway robbery, were held to be actionable.

III. That the criminal act was meant to be imputed to the *plaintiff*.

The application of the injurious charge to the plaintiff may be collected, generally, from any circumstances which indicate the intention of the defendant, so to apply his words, and which induced the hearers to suppose that the plaintiff was the person meant.

Thus, if the defendant should say, "I (p) know what I am, and I know what the plaintiff is ; I never did such an act," (specifying some criminal act,) the words would be actionable,

(n) *Sir John Knightly v. Marrow*, 3 Lev. 68.

(o) *Lawrence v. Woodward*, Cro. Car. 177.

(p) 2 Lev. 150. *Snell v. Webling*, 1 Vent. 276.



provided the hearers understood the offence to have been imputed to the plaintiff by such words

Where a charge has been imputed to one of several, without specifying him, it has been held in many of the older cases, that no action was maintainable by any of them. The defendant said to three men who had given evidence against him, "One (*q*), of you is perjured." And upon an action brought by one of them, it was adjudged, that no action lay.

And so it has been held, that for the words, "One of my brothers is perjured." Although one of the brothers should bring an action, and aver that the words were spoken concerning him, yet, on account of the apparent uncertainty, no action would be maintainable (*r*).

But it has since been held, that for the words, "A. (*s*) or B. murdered C." either A. or B. might bring an action.

If from the plaintiff's statement it appear, that he *could have been meant*, the finding of the jury for him will be conclusive as to the defendant's application of the charge to him, for otherwise they could not have given him damages.

The application to the plaintiff may be ascer-

(*q*) Cro Eliz. 497.

(*r*) Per Tanfield, J. in *Wiseman v. Wiseman*, Cro. J. 107.

(*s*) 10 Mod. 196. Cart. 56.

tained by a variety of circumstances ; as from his having been (t) the subject of previous (u) conversation, or from his being described by name, or by any other means which are sufficient to induce the hearer to apply the offensive imputation to the plaintiff.

The plaintiff was a justice of the peace, and Receiver of the Court of Wards, and by reason thereof received great sums of money for the king, and was used with much confidence by the king ; and the defendant, speaking concerning him with one Thomas Whorewood, spoke these words, " Mr. (x) *Deceiver* hath deceived the king." After a verdict for the plaintiff, the court, on motion in arrest of judgment, held, that the action well lay ; that the words " Mr. Deceiver," were an ironical allusion and nick-name to his office and place ; and that if such crafty evasions should be admitted, it would be an usual practice to slander *sans* punishment.

If A. B. say to C. D. before whom E. F. is walking, " He (y) that goeth before thee is perjured," an action lies, if it appear that none but E. F. was walking before C. D. at the time of speaking.

(t) 1 Rol. Ab. 85. 1 Rol. Ab. 75.

(u) Cro. J. 557. 6 Bac. Ab. 231.

(x) *Sir Miles Fleetwood v. Curl*, Cro. J. 557.

(y) 1 Rol. Ab. 81.

112. CIVIL REMEDY ; ACTIONABLE WORDS.

In the case of *J. Anson* (z) v. *Stuart*, the plaintiff was thus described in the libel :—" This diabolical character, like Polyphemus the man-eater, has but one eye ; and is well known to all persons well acquainted with the name of a certain noble circumnavigator (meaning by the last mentioned words to allude to the name of the plaintiff, *J. Anson*.)

From these (a) and a number of similar instances, it may be laid down as a general rule, that the application of the words to the plaintiff is a matter to be collected by the jury, from the particular circumstances of each case.

The difficulties which occur upon this point, are generally of a technical nature, and consist in the doubt, whether the plaintiff has so stated his case in the declaration as to show that the conclusion could properly be drawn : the consideration of these, however, belongs to a subsequent division of the subject.

(z) 1 T. R. 748.

(a) Cro. Eliz. 497. Cro. J. 444. 2 Barnard. Rep. *Hughes v. Winter*, Keb. 525.

## CHAPTER II.

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*When an infectious disorder is imputed.*

ANOTHER branch of cases where the law allows an action to be maintained, without actual proof of special damage, consists of those where a person is charged with having an infectious disease, the effect of which imputation, if believed, would be to exclude him from society.

It has been said (a), that, "Since man is a being formed for society, and standing in almost constant need of the advice, comfort, and assistance, of his fellow creatures, it is highly reasonable that any words which import the charge of having a contagious distemper, should be in themselves actionable ; because all prudent persons will avoid the company of one having such a distemper.

As the ground of proceeding is the presumption that the plaintiff will be wholly or partially excluded from society and its comforts, the action is consequently confined to the imputing those disorders which are so infectious in their

(a) 6 Bac. Ab. 212.

nature, and pernicious in their effects, as to render the person afflicted an object likely to be shunned and avoided.

Actions for words of this description seem, in the absence of special damage, to have been confined to charges of leprosy and lues venerea. For though it was held, that an action lay for saying, "He (*b*) buried people who died of the plague in his house," it appears that special damage was laid and proved.

There is, however, one case in which it has been held, that to charge another with having the "falling (*c*) sickness," is actionable.

So great, formerly, was the dread of leprous contagion, that an especial writ was provided for the removal of the infected object to some secluded place, where he might no longer be a terror to society: happily this writ has long lost its use.

It seems, however, that though the reason has in some degree ceased to operate, an action will, even at this day, be sustainable for a charge of either of the diseases (*d*) alluded to.

From the case of *Villars* and *Monsley* (*e*), it appears, that to say another has the *itch*, is not

(*b*) Kit. 173. b. 1 Com. Dig. 252.

(*c*) 1 Rol. 44. l. 7.

(*d*) *Carslake v. Mapledoram*, 2 T. R. 473.

(*e*) 2 Wills. 403.

actionable; though such an accusation would be actionable if written. It is to be remarked, that in the above case, both Wilmot, C. J. and Gould, J. seem to take for granted, that to impute the *plague* is actionable; but no case was cited in which this point has been expressly determined.

The ground of the action being the presumption of the plaintiff's exclusion from society, no action will lie for an imputation in (*f*) the past tense, for such an assertion does not represent the plaintiff, at the time of speaking, to be unfit for society, and therefore the substance of the action is wanting; and it was observed, in the case of *Carslake v. Mapledoram*(*f*), that this doctrine was justified by all the cases, except one, and that loosely reported.

With respect to the terms in which the imputation is conveyed, as in other cases, they may either expressly and by their own power impute the disease, or by the aid of collateral circumstances may render the implication unavoidable.

Thus, to say (*g*) a man has the leprosy, or to call him leprous knave, is actionable: the term leper being in itself a clear and unequivocal designation of the speaker's meaning.

\* (*f*) *Carslake v. Mapledoram*, 2 T. R. 473. Str. 1189

(*g*) 2 T. R. 473. Cr. J. 144.

Without citing the disgusting string of cases upon this subject, with which the older reports abound, it may be deemed sufficient to observe, that wherever it can be collected from the circumstances, that the speaker intended the hearers to understand that the person spoken of was at the time of speaking, afflicted with either of the disorders above mentioned, an action may be maintained. And the meaning may be evidenced either by reference to the mode in which the disease was communicated, the symptoms (*h*) with which it is attended, its effects upon the person (*i*) or constitution, the means (*k*) of cure, the necessity of avoiding (*l*) the person infected; or, in short, by any other allusion capable of conveying the offensive imputation.

(*h*) Holt. 563.

(*i*) Cro. J. 430. 144. 1 Vin. Ab. 488. Cro. Eliz. 214. 289.

(*k*) Cro. J. 430. Cro. Eliz. 648. Roll. Rep. 420.

(*l*) Cro. J. 430.

## CHAPTER III.

*Where the Imputation affects a Person in his Office, Profession, or Business.*

NEXT to imputations which tend to deprive a man of his life, or liberty, or to exclude him from the comforts of society, may be ranked those which affect him in his office, profession, or means of livelihood. To enumerate the different decisions upon this subject would be tedious, and to reconcile them impossible; yet they seem to yield a general rule, sufficiently simple and unembarrassed; namely, that words are actionable which directly tend to the prejudice of any one in his office, profession (*a*), trade, or business.

Observations upon this class of cases may be divided into those relating to the *grounds of the action*,—*the extent of the action*.—and *the degree of certainty and precision requisite to render the words actionable*.

Words which affect a person in his office generally are actionable, whether the office be merely confidential and honorary, or be productive of

(a) 3 Wils. 186.



emolument. The ground of action in the two cases, seems, however, to be somewhat different. Where his office is lucrative, words which reflect upon the integrity or capacity of the plaintiff render his tenure precarious, and are therefore *pro tanto* a detriment in a pecuniary point of view ; but where the office is merely confidential, the presumptive loss of emolument cannot supply the ground of action.

The whole class of cases in which magistrates and others (whose offices are merely confidential and honorary) have been allowed to recover a pecuniary compensation for words relating to their official character, seems to rest upon more dubious principles than any other in which a remedy is given without proof of some specific loss. For as even the loss of office itself would not be attended with any loss of emolument, such as would naturally result from deprivation of liberty, or exclusion from society, the evil seems scarcely to admit of pecuniary admeasurement. Besides, the bad consequences which arise from degrading the magistracy, are of a public nature, and are therefore rather a matter of criminal than of civil cognizance, especially as the damages in a civil action are not considered to be of a penal nature, but are given as a private compensation to the party injured. It has long, however, been fully established, that words are equally actionable whether

the office or profession to which they relate be lucrative or merely confidential.

So that words spoken of Justices of the Peace, or physicians, or barristers, are frequently actionable, although the office of the first be merely confidential, and the latter are not in legal contemplation entitled to demand the payment of fees. Where the office is simply confidential, a singular distinction has been taken between words imputing want of *ability* in the holder, and those which charge him with want of *integrity*.

It has been held, that to charge a person in such an office with any corruption, or with any ill design or principles, is actionable; but that to represent him as wholly incompetent, in point of ability, to hold the office, is not a slander for which an action is maintainable. The reason assigned for the distinction is so remarkable, that it may be proper to give it in the very words of Lord Holt.

He says (b), "It has been adjudged, that to call a Justice of the Peace, blockhead, ass, &c. is not a slander for which an action lies, because he was not accused of any corruption in his employment, or any ill design, or principle; and it was not his fault that he was a blockhead, for he cannot be otherwise than his Maker made him;

(b) *Howe v. Prinn*, Holt, 653. Salk. 694.

but if he had been a wise man, and wicked principles were charged upon him when he had not them, an action would have lain; for though a man cannot be wiser, he may be honestest than he is. If a person be in a place of profit, and he is accused of insufficiency, he shall have remedy by action. 'Tis otherwise if he be only in a place of honour; though even there, if he is charged with ill principles, and as disaffected to the government, he shall have an action for such scandal to his reputation."

In the case of *Onslow (c) v. Horne*, L. C. J. De Grey, in giving judgment, observed, "It was objected at the bar, on the side of the defendant, that words spoken of an officer, or magistrate, are not actionable, unless they carry an imputation of a criminal breach of duty. I will not give this my sanction, because I think for imputation of ignorance to one in a profession or office of profit, an action will certainly lie."

After it had once been established that a magistrate might recover a pecuniary compensation for words which rendered his tenure precarious, the action in reason and principle extended itself to all imputations which could affect that tenure, and as gross ignorance is, as well as corruption, a

sufficient cause of deprivation, it is difficult to say why an imputation of the former kind should not be actionable as well as one of the latter; the malice of the author, the falsity of the charge, and its probable consequences, being in the two cases precisely similar. It may be added, that the distinction is inconsistent with the class of cases in which barristers and physicians (whose situations are, in law considered as merely honorary) have been allowed to recover for words imputing want of ability, as well as for those which charged them with want of integrity.

The case of *Bill (d) v. Neal* was a precedent for the opinion of C. J. Holt, in the case of *Howe v. Prinn (e)*. There Foster, C. J. and Wyndham and Twysden, Js. decided against the opinion of Mallet, J. that the words, "He is a fool or ass, a beetle-headed justice," were not actionable. But the three justices founded their opinion upon the cases of *Sir John Hollis v. Briscoe (f)*, and of *Hammond (g) v. Kingsmill*.

In the former case, the plaintiff was a justice of the peace and deputy-lieutenant of a county, and the defendant said to his servant, "Your master is a base rascally villain, and is neither nobleman, knight, or gentleman, but a most villainous ras-

(d) 1 Lev. 52.

(e) Holt, 652.

(f) Cro. J. 58.

(g) 7 J. 1.

cal, and by unjust means doth most villainously take other men's rights from them, and keepeth a company of thieves and traitors to do mischief, and giveth them nothing for their labours but base blue liveries, and this all the country reports, and other good he doeth not any." And the defendant had judgment, chiefly on the ground, that the words were to be construed according to the now exploded doctrine of the *mitior sensus*, for which reason the case can scarcely be considered as an authority. In the latter case, the words were, "He *was* a debauched man, and not fit to be a justice." But it appears (*h*) that the judgment in that case was given for the defendant, because the words were spoken of a time past; and Twysden, J. said, that it would have been otherwise if the words had been, "he *is* a debauched man." The two cases, therefore, upon which reliance was placed, in the case of *Bill v. Neale*, seem to be no sufficient authorities for that decision.

Where words relate to a man's official character, the danger of exclusion from office gives rise to the action. It was held, indeed, that an action was maintainable for the words, "When (*i*) thou wert a justice, thou wert a bribing justice." And it was said, that though they refer to a thing past, yet they defame him for ever in other peo-

(*h*) 1 Vent. 50. *Sir J. Herle v. Osgood*.    (*i*) Yel. 153.

ple's opinions, and make him accounted unworthy to bear office afterwards. The authority, however, of this decision appears to be very suspicious, and the reason given would apply to every case where general want of integrity is imputed to a private individual, for it may by possibility have the effect of preventing him from being put into the commission.

C. J. De Grey (*k*), in giving judgment in *Onslow v. Horne*, said, "I know of no case, wherever an action for words was grounded upon eventual damages, which may possibly happen to a man in a future situation, notwithstanding what the chief justice throws out in 2 Vent. 366., where he is made to say, 'That where a man had been in an office of trust, to say he behaved himself corruptly in it, as it imported great scandal, so it might prevent his coming into that or the like office again,' I think the chief justice went too far."

And where an action is brought for words spoken of a barrister or physician, it must appear that he practised (*l*) as such at the time the words were spoken; for otherwise the words could not have affected him professionally. A doubt has been raised, whether damages are properly reco-

(*k*) 3 Wils. 188.

(*l*) 6 Bac. Ab. 215. Ib. 216. Sty, 231. Poph. 207.

verable by barristers and physicians for words relating to their professions, since their fees are merely honorary, and not demandable in a court of law (*m*) ; the actual decisions, however, upon the subject, leave no doubt as to their right to recover for such words ; and if their situations be considered as merely confidential, their right to recover rests upon the same foundation with that of magistrates and others, whose offices are of a similar description.

*As to the extent of the action:*

The action appears to extend to all offices of trust or profit, without limitation, provided they be of a temporal nature. Thus it has been held, that an action is maintainable for words spoken of a churchwarden (*n*).

It has been said, that to call (*o*) an escheator, coroner, sheriff, attorney, or such as are officers of record, "extortioner," an action lies ; but that for calling a bailiff or steward of a base court, who are not officers of record, "extortioner," no action lies ; because extortion cannot be but in such as are officers of record.

There seems, however, to be little force in this

(*m*) 6 Bac. Ab. 215.

(*n*) Sty. 338. 1 Vin. Ab. 463. Cro. J. 339. 2 Buls. 218. Cro. E. 358.

(*o*) Dal. 45. pl. 35. 1 Vin. Ab. 463.

distinction, for any man is punishable for extortion (*p*).

It was held, that for saying of the deputy of Clarencieux, king of arms, that he was (*q*) "a scrivener, and no herald," an action was maintainable. So for words of the master of the mint (*r*); of a clerk to a public company (*s*); of a town clerk (*t*); of a steward (*u*) of a court.

But where the defendant (*x*) said of a member of parliament, "As to instructing our members to obtain redress, I am totally against that plan; for as to instructing Mr. Onslow (the plaintiff), we might as well instruct the winds, and should he (the plaintiff) even promise his assistance, I should not expect him to give it us;" after verdict for the plaintiff, judgment was arrested, and it was observed by C. J. De Grey, on that occasion, that the words did not charge the plaintiff with any breach of his duty, his oath, or any crime or misdemeanor, whereby he had suffered any temporal loss in fortune, office, or in any way whatever.

(*p*) Dal. 43. 1 Vin. Ab. 463.

(*q*) Cro. El. 328.

(*r*) Leo. 88.

(*s*) Cro. El. 358.

(*t*) Hutt. 23.

(*u*) 1 Roll. Ab. 56.

(*x*) *Onslow v. Horne*, 3 Wils. 177. Words which are in themselves actionable, are not the less so from having been applied to a candidate to serve in Parliament. *Harwood v. Sir J. Astley*.



The action extends to words spoken of men in their profession, as barristers (*y*), attornies (*z*), physicians (*a*), and clergymen (*b*). But it may be doubted, whether words spoken of a clergyman would be actionable, unless he held some benefice or preferment, of which he might be deprived if the words were true. The reason usually given for supporting the action in such a case, is that the imputation would be a cause of deprivation (*c*). But if he be in the actual receipt of any professional temporal emolument, as preacher, under-lecturer, or even as an occasional reader, and the charge, if true, would be ground of degradation from holy orders, the imputation would, it seems, in principle, be actionable.

An action extends to words affecting a person in the particular art by which he gains his livelihood, as of a schoolmaster (*d*). It has been held, indeed, that to slander a schoolmistress, who taught children to read and write, in her vocation, was not actionable. The authority of the

(y) 2 Vent. 28.

(z) 1 Lev. 297.

(a) 1 Roll. Ab. 54. per Twisden, 1 Ven. 21. Cro. Car. 270.

(b) Al. 63. 3 Lev. 17. 1 Roll. Ab. 58. Str. 946. As to say of a clergyman he speaketh lies in the pulpit, for it is a cause of deprivation. 1 Holt. 58. l. 30. But to say of a clergyman, you are an old rogue, rascal, and contemptible fellow, it seems is not actionable. *Musgrove v. Bovey*, Str. 946.

(c) 1 Roll. 58. l. 30.

(d) 2 Roll. R. 72. Het. 71.

dictum, however, appears to be questionable. It was decided in the case in which it is reported to have been delivered, that to accuse a midwife (e) of ignorance in her profession was actionable; and it is difficult to say upon what principle a schoolmistress is not as much entitled to the protection of the law against malicious attacks, by which her means of living are likely to be impaired, as a midwife.

So any words tending to injure a merchant or tradesman are actionable; whether they reflect upon the honesty of his dealings, his credit, or the excellence of the subject matter in which he deals.

To say of a cornfactor, "You are a rogue and a swindling rascal, you delivered me 100 bushels of oats, worse by 6s. a bushel than I bargained for," are actionable without proof of special damage (f).

And the action seems to extend to words spoken of a person *in any lawful employment*, by which he may gain his livelihood.

The defendant said (g), "Thou hast received money of the king to buy new saddles, and hast cozened the king, and bought old saddles for the

(e) 1 Vent. 21.

(g) Mar. 82. 1 Vin. Ab. 465. pl. 19. *Sir R. Greenfield's* case.

(f) *Thomas v. Jackson*, 3 Bingham, 104.

troopers." And the words we held to be actionable; for it was said, it was not material what employment the plaintiff held under the king, if he might lose his employment and trust thereby, and that it was immaterial whether the employment was for life or for years.

The defendant (*h*) said of a person employed by the under-postmaster to carry about post letters, on which he had a profit, "He has broken up letters, and taken out bills of exchange." After verdict and judgment for the plaintiff, one cause of error assigned was, that no action would lie for scandalizing such an employment; and Hale was of opinion, chiefly from the quality of the employment, that the judgment ought to be reversed; for he said that a man should not speak disparagingly of his cook or groom, but an action would be brought, if such action could be maintained.

The humility of the employment or occupation seems, however, to be no objection to the action either in law or reason; and it has long been clearly established, that an action is maintainable for malicious misrepresentations of the characters of menial servants,—a subject which will afterwards be more fully considered.

In the case of *Seaman v. Bigg* (*i*), in the reign

(*h*) 1 Vent. 275.

(*i*) Cro. Car. 480.

of Cha. I., it was held, that the words, "Thou art a cozening knave, and hast cozened thy master of a bushel of Barley," spoken of a servant in husbandry, were actionable; and the court said, that though true it is, generally, an action will not lie for calling one cozening knave, yet where they be spoken of one who is a servant, and accomptant, and whose credit and maintenance depends upon his faithful dealing, and he by such disgraceful words is deprived of his livelihood and maintenance, there is good reason it should leave an action for loss of his credit and means. So the words, "He (*k*) is a cheating knave," applied to a lime-burner in his employment, have been deemed to be actionable.

But a jobber (*l*) or dealer in the public funds, is not considered as a known trader, and possessing a character as such.

It does not appear to be necessary, that the party should gain his living in the character to which the slander is applied, but it is sufficient, if he habitually act in that character, and derive emolument from it.

The rule, however, does not seem to extend to representations, which affect nothing more than casual instances, in which the plaintiff has as-

(*k*) 1 Lev. 115. *Terry v. Hooper*.

(*l*) 2 Bos. & Pul. 284.

sumed such a character. So that words misrepresenting the value of a horse, or particular piece of furniture, which the proprietor wishes to dispose of, would not be actionable, unless some special damage resulted from them.

Next as to the degree of *certainty and precision* requisite to make the words actionable.

The only question arising upon this point seems to be this, Do the words in any degree prejudice the plaintiff in his office, profession, or employment? If they do, they are actionable; the quantum of damage being a mere question of fact for the consideration of the jury.

Words in general belonging to this class relate either to the plaintiff's *integrity*, his *knowledge, skill, or diligence*, his *credit*, or to the *subject matter in which he deals*.

The effect of such imputations will be separately considered.

To impute want of integrity to any person who holds an office of trust or of profit is actionable: as to say of a judge (m), that "His sentence was corruptly given."

Or of a justice of the peace (n), "I have often been with him for justice, but could never get any thing at his hands but injustice."

(m) Cro. Eliz. 305.

(n) Cro. Car. 14.

Or, "He covereth and hideth felonies (*o*), and is not worthy to be a justice of the peace."

Where a person holds an office or situation, in which great trust and confidence must be reposed in him, words which impeach his integrity generally, though they contain no express reference to his office, are actionable; since they must necessarily attach to him in his particular character, and virtually represent him as unfit to hold that office or situation.

Thus it has been held, that to say of a bishop, "He is a wicked man (*p*)," is actionable.

The defendant said of a justice of the peace and deputy lieutenant (*q*), "He is a Jacobite, and for bringing in the Prince of Wales and popery." And the words were held to be actionable, though it did not appear that the speaker applied the words to his offices, because, without any such application, they imputed such religious opinions and political principles, as rendered him in law unfit for those situations.

So where the defendant said of the plaintiff, who was a justice of the peace (*r*), "I am in danger of my life, my blood is sought, and I was like to have been murdered; I was at Sir J. Harper's (the plaintiff's) house, and John Har-

(*o*) 4 Rep. 16.

(*p*) 2 Mod. 159.

(*q*) *How v. Prinn*, Holt, 652.

(*r*) *Sir J. Harper v. Francis Beaumont*, Ct. J. 56.

per drew me forth to see a gelding in the stable, and then Thomas Beaumont, Sir H. Beaumont's son, did throw his dagger at me twice, and thrust me through the breeches twice with his rapier to have killed me, all this was done by the instigation of Sir J. Harper, and I can prove it."

In this case, although no misconduct in office was particularly pointed out, it was held that the action well lay; the instigation to do such an outrageous act being against the plaintiff's oath, and a great misdemeanor, for which he was liable to fine and to be put out of the commission.

The defendant said to the plaintiff, who was one of the attorneys or clerks of the King's Bench, and sworn to deal duly without corruption in his office, "You are well known to be a corrupt man, and to deal corruptly." And upon giving judgment for the plaintiff, it was said, *quod sermo relatus ad personam, intelligi debet de conditione personæ* (s).

The defendant said of the plaintiff, who was an attorney, generally (t), "He is a common barretor." After verdict, though it was objected, that the words were not actionable, having been spoken of the plaintiff as a common person, and not in relation to his office, yet the court held

(s) 4 Rep. 16.

(t) Cro. Car. 192.

that the action was maintainable ; for it is a great slander to an attorney to be called and accounted a common barretor, who is a maintainer of brabbles and quarrels, and said that words are to be construed *secundum conditionem personarum* of whom they are spoken.

The defendant said of an attorney (u) "Thou art a false knave, a cozening knave, and hast gotten all that thou hast by cozenage, and thou hast cozened all that have dealt with thee." And the court held that the words were actionable, as touching the plaintiff in his profession:

An attorney brought an action for the words (x), "I have taken out a judge's warrant to tax Phillips's (the plaintiff's) bill, I'll bring him to book, and shall have him struck off the roll." Lord Kenyon, C. J. ruled, at nisi prius, that the words were not actionable ; and added, had the words been, "He deserves to have been struck off the roll," they would have been actionable.

With respect to this distinction, it may be proper to suggest a doubt, whether the words in the principal case cited would not in common acceptation convey to the hearer the same meaning with the words which the learned judge

(u) Cro. Jac. 586.

(x) *Phillips v. Jansen*, 2 Esp. 624.



is reported to have deemed to be actionable, since they seem as clearly to evince the opinion of the speaker, that the plaintiff deserved to be struck off the roll, and no one would choose to employ an attorney who made exorbitant charges.

Words imputing dishonesty to a tradesman, it seems, are not actionable, unless they be spoken with reference to trade. So that to call (*y*) a tradesman a cheat, generally, has been held not to be actionable. But otherwise to say, "He (*z*) keeps false books;" for the words evidently relate to his course of trading. So to call a tradesman a rogue (*a*) or a cheat, with reference to his trade, is actionable. But to say generally of such a person, "Thou (*b*) hast no more than what thou hast got by cozening and cheating," has been (*c*) held not to be actionable.

It may, however, be doubted, whether there is any solid distinction between these cases, since every tradesman's livelihood depends in some measure upon his general character for honesty and integrity; and it is difficult to suppose, that a general imputation of dishonesty, if believed, would not operate to his prejudice. It seems that some degree of trust and confidence

(*y*) 3 Salk. 326.

(*z*) Holt, R. 39.

(*a*) Burr. 1688.

(*b*) 12 Mod. 307.

(*c*) 12 Mod. 307.

must be reposed in the plaintiff, in order to render words reflecting upon his character for integrity actionable. Thus the words of a carpenter (d), "He has charged Mr. Andrews for forty days' work, and received the money for the work, that might have been done in ten days, and he is a great rogue for his pains," were, after verdict, held not to be actionable.

The distinction seems to be this: Where great confidence must necessarily be reposed, as in an attorney or superintendant, words generally reflecting upon his character are actionable; but where mere ordinary confidence is reposed, in the common course of honest dealing, as that a tradesman shall charge a fair price for his goods, or an artificer, surveyor, or mechanic for his labour, the law holds that the words are not so injurious as to bear an action unless they are applied to the plaintiff's trade or business with certainty and precision.

So where the office, profession, or employment of the plaintiff, requires great talent and high mental attainments, general words, imputing want of ability, are actionable without express reference to his particular character, for they necessarily include an ability to discharge the duties of such a situation; but where the em-

(d) *Lancaster v. French*, Str. 797.

ployment is of a mere mechanical nature, the words to be actionable must be applied to it clearly and unequivocally.

Thus, to say of a barrister (*e*), generally, that he is a "dunce," is actionable, the word dunce being commonly taken to mean a person of dull capacity who is not fit to be a lawyer.

So, to say of a physician (*f*), that he is "no scholar," is actionable, a learned education being considered to be an essential qualification in the medical profession.

To say of a servant, that he is a "lazy, idle, and impertinent fellow," is actionable; for these words, though spoken without express reference to his service, cannot but affect his character as a servant, as no one would be willing to employ a person of idle and impertinent habits.

In general, however, the words must be spoken with reference to the particular situation of the plaintiff, in which case they are actionable if they impute any want of knowledge, skill, or diligence, in the exercise of his office or avocation: as to say of an apothecary (*g*), "It is a world of blood he has to answer for in this town: through his ignorance he did kill a woman and two children at Southampton; he did kill J. P.

(*e*) *Peard v. Johnes*, Cro. Car. 382.

(*f*) 6 Bac. Ab. 215. 1 Roll. Ab. 54. Cro. Car. 270.

(*g*) *Tutty v. Alewin*, 11 Mod. 221.

at Petersfield ; he was the death of J. P. ; he has killed his patient with physick."

So (h) where the defendant said of a midwife, "Many have perished for her want of skill."

The words spoken of a watchmaker were, "He (i) is a bungler, and knows not how to make a good piece of work. After verdict for the plaintiff, the words, on motion in arrest of judgment, were held by the court not to be actionable, not having been laid to be of the plaintiff's trade, but it was said that had the words been, "he knows not how to make a good watch," they would have been actionable. It may, however, be doubted whether this case would not now meet with a different decision ; the point upon which the court gave judgment, was in a great measure technical ; and indeed the averment, that the words were spoken in derogation of the plaintiff's workmanship, seems scarcely to be necessary, for if it were believed that the plaintiff was a bungler, and could not make any piece of work well, how could it be supposed that he could make a good watch, a piece of work requiring very considerable skill and dexterity.

The law has shown great tenderness in pro-

(h) *Flower's case*, Cro. Car. 211.

(i) *Redman v. Pyne*, 1 Mod. 19.

tecting merchants and traders against imputations upon their credit, which if believed must necessarily operate to their serious prejudice. Formerly (*k*), indeed, it was held that the words, to support an action, must import bankruptcy: this doctrine has, however, long been abandoned (*l*), and it seems that such words spoken of a person in any business are now considered to be actionable. And it is not essential to the action, that the words should impute want of credit at the time of speaking them. The defendant said, "He (*m*) came a broken merchant from Hamburgh;" and the words were held to be actionable, since the plaintiff was charged with having been once broken, *et qui semel est malus semper præsumitur esse malus in eodem genere*, and that they were a cause of discrediting the plaintiff in his trade, and of injuring him in his credit, which was a great means of gain. And it is not necessary that the words should be spoken with express reference to the plaintiff's trade, since a general charge of want of credit necessarily includes the particular one, and is equally pernicious with a more precise alle-

(*k*) Holt. 39.

(*l*) See *Read v. Hudson*, 1 Ld. Ray. 610. *Southam v. Allen*, Sir T. Ray. 231. *Whittington v. Gladwin*, 5 B. and C. 160.

(*m*) *Seycroft v. Dunker*, Cro. Car. 317.

gation. Thus, to say generally of a merchant, that he is "*broken*," is actionable, these being common and vulgar words of one who fails in his credit and becomes a bankrupt. Words of this class are actionable when applied to a person carrying on a business purely mechanical, so that to call a dyer (*n*) bankrupt knave, is actionable.

And any words which in common acceptation imply want of credit are sufficient, as to say of a tailor (*o*), "I heard you were run away." Formerly, indeed, it was held that to call a trader "bankruptly knave (*p*)" was not actionable; but the distinction between words adjectively spoken, and those containing an express and direct allegation, have, as has already been observed, been long deservedly disregarded.

So, to say of a stock-broker (*q*), that he is "a lame duck" is actionable.

So of a trader, "You are a sorry pitiful fellow and a rogue, and compounded your debts for 5*s*. in the pound (*r*)."

So where the defendant said (*s*), "All is not

(*n*) Cro. J. 585.

(*o*) *Davis v. Lewis*, 7 T. R. 17.

(*p*) Cro. J. 345.

(*q*) *Morris v. Langdale*, 2 B. & P. 84.

(*r*) Ld. Raym. 1480. Str. 762.

(*s*) 3 Salk. 326.

well with Daniel Vivian; there are many merchants who have lately failed, and I expect no otherwise of Daniel Vivian."

So, to say of a pawnbroker (*t*), "He is a broken fellow."

To a milliner (*u*), "You are not worth a farthing."

So though words merely import the speaker's opinion; as where the defendant said (*x*), "Two dyers are gone off, and for aught I know Harrison will be so too within this time twelve-month."

So where defendant said to an upholsterer (*y*), "You are a soldier, I saw you in your red coat doing duty; your word is not to be taken:" the words were held to be actionable, it being a common practice, at the time they were spoken, for traders to protect themselves against their creditors by a counterfeit enlisting, a soldier having by act of parliament the privilege of freedom from arrest.

So where the words were spoken of a carpenter (*z*); "He is broken and run away, and will never return again;" after verdict for the plain-

(*t*) Holt. R. 652.

(*u*) Cro. Car. 265.

(*x*) 10 Mod. 196, *Harrison v. Thornborough*.

(*y*) *Arne v. Johnson*, 10 Mod. 111.

(*z*) *Chapman v. Lamphire*, 3 Mod. 155.

tiff, it was urged in arrest of judgment, that the words were not actionable, for though broken, the plaintiff was as good a carpenter as ever ; but it was answered by the court, that the credit which a man has in the world may be the means to support his skill, for he may not have an opportunity to show his workmanship without those materials wherewith he is entrusted.

And where the defendant said of a husbandman (a), "He owes more than he is worth ; he is run away : " the words were held to be actionable, though it was objected that it should not only appear that the plaintiff had a trade, but that he got his living by it.

And next, the words are actionable when they throw discredit upon the particular commodity in which the party deals.

Thus, to say of a trader (b), "He hath nothing but rotten goods in his shop," is actionable ; though it was said in the case referred to, that had the words been "he hath rotten goods in his shop," they would not have supported the action, and that the slander consisted in saying that he had *nothing* but rotten goods in his shop.

So to tax a bookseller falsely (c) with having

(a) *Dobson v. Thorstone*, 3 Mod. 112.

(b) Cro. Car. 570.

(c) *Tabart v. Tipper*, 1 Camp. N. P. 350.



published an absurd poem, is actionable, the evident tendency of the imputation being to injure him in his business.

So where the defendant said of the plaintiff, who was an innkeeper (*d*), "Deal not with Southam, for he is broken, and there is neither entertainment for man nor horse."

And words imputing insolvency to an innkeeper are actionable, though at the time the words were spoken he was not subject to the bankrupt laws (*e*).

So a *false and malicious* account (*f*) of the performance at a place of public amusement will support an action.

So where the defendant, who was printer of a newspaper, called the Oracle, published the following paragraph concerning the True Briton newspaper, of which the plaintiff was proprietor:

"*Times v. True Briton* (*g*).

"In a morning paper of yesterday was given the following character of the True Briton:—that 'It was the most vulgar, ignorant, and scurrilous journal ever published in Great Britain.' To the above assertion we assent, and to this account we add, that the first proprietors abandoned it, and

(*d*) 3 Salk. 326.

(*e*) *Whittington v. Gladwin*, 5 B. & C. 150.

(*f*) *Dibdin v. Swan and Bostock*, 1 Esp. 27.

(*g*) *Heriot v. Stewart*, 1 Esp. 437.

that it is the lowest now in circulation, and we submit the fact to the consideration of advertisers."

It was held by Lord Kenyon at *Nisi Prius*, that the latter words of the paragraph, as affecting the sale of the paper and the profits made by advertising, were actionable.

Where the plaintiff was a butcher (*h*), and brought his action for the words taxing him with having exposed to sale the flesh of a cow which died in calving, it was held after verdict, that the words were not actionable, even though special damage was laid and proved. This case seems, however, to be very loosely reported, and is not supported by either analogy or principle.

Unless words affecting the plaintiff's means of livelihood fall within one of the foregoing descriptions it may be concluded that they are not actionable.

The defendant said of the plaintiff, who taught girls to dance, "that she was an hermaphrodite (*i*)," and it was held that the words were not actionable, and that it was no scandal to her profession to say that she was an hermaphrodite, because men usually teach young women to dance,

(*h*) *Tassan v. Rogers*, 2 Salk. 693.

(*i*) 3 Salk. 397.

## CHAPTER IV.

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### *Where the Words tend to the Party's Disinheritance or affect his Title to Land.*

WORDS falling within this division either affect the probability of the plaintiff's succeeding to an estate in future, or impeach a title which has already accrued.

Instances of the former class, where damages have been allowed to be recovered on account of the manifest tendency of the imputation to defeat the plaintiff's expectations, are exceedingly rare, and seem to have been confined to words impeaching the legitimacy of the birth of an heir apparent.

The defendant (a) said to the plaintiff, who was heir apparent to his father and uncle, "Thou art a bastard." After verdict for the plaintiff, the court, on motion in arrest of judgment, held that the action was maintainable, since by reason of the words the plaintiff might be in disgrace with

(a) *Humphreys v. Stanfield*, Cro. Car. 469. Jo. 388. Godb. 451.

his father and his uncle, and they conceiving a jealousy of him touching the same, might possibly disinherit him, and that though they eventually should not, yet that the action well lay for the damage which might come; and the cases of *Vaughan v. Leigh*, and of *Banister v. Banister* (b), were cited by Jones, J. as in point.

In the first of these cases (c) the plaintiff showed that land had been given in tail to his grandfather, and that his father had divers sons, whereof he was the youngest, and his eldest brothers living. That a certain person offered to buy the land, and was willing to give him such a sum of money for his title, and by reason of the words refused to give him any thing. After judgment for the plaintiff in the Exchequer, it was assigned for error, that it appeared by the plaintiff's own showing that he had not any present title, and therefore no cause of action. But the two chief justices conceived that although he had not any present title, it appeared that he had a possibility of inheriting the lands, and that being offered a sum of money to join in the assurance, although he had not any present title, yet by reason of the words he had a present damage, and in future might receive prejudice

(b) 4 Coke, 17.

(c) Cro. J. 215. by the name of *Vaughan v. Ellis*.

thereby in case he were to claim the lands by descent.

This case, though cited as an authority for the former decision, does not warrant it to the full extent, for in the latter a loss had actually accrued to the plaintiff in consequence of the words; in the former the supposed prejudice consisted in the probability that the expectation of the heir apparent would be defeated.

In the case of *Turner v. Sterling* (d), it was said by the court, "The law gives an action for but a possibility of damage, as an action lies for calling an heir-apparent bastard."

In an earlier case (e) the court observed, "The word bastard is determinable by the Spiritual Court, but if the plaintiff add further words to entitle himself as heir, or show some *possibility* of being heir, this shall make the same words calling him bastard to be actionable.

The decisions upon this point do not, however, appear to have been uniform; in the case of *Turner v. Sterling* (f), above cited, Vaughan, J. said, "I take it not to be actionable to call a man a bastard whilst his father is alive, the books are cross in it; nay, if lands had

(d) 2 Vent. 26. Vaughan, J. dissent.

(e) 2 Buls. 90.

(f) 2 Vent. 26. See also 1 Roll. Abr. 37. pl. 18.

descended, I doubt whether it would be actionable any more than to say one has no title to land."

The last express decision upon the point appears to be that of *Humphreys v. Stanfield* (g), already referred to, where it was decided that words which alleged that an heir apparent was a bastard, were actionable.

Words impeaching the plaintiff's *present title* to lands, have in many of the older cases been deemed to be actionable without proof of special damage.

Thus, where a remainder-man (h) brought an action against the defendant for saying that the tenant in tail had issue one D. who was then alive, it was held that the action was maintainable.

It appears, however (i), from a copious class of decisions, that no action can be supported for words affecting the present title of a plaintiff to an estate, without showing that some special damage and inconvenience has resulted from them, as that he was prevented from selling or making some advantageous disposition of it: the parti-

(g) Cro. Car. 469.

(h) *Bliss v. Stafford*, Ow. 27. Mo. 188. Jenk. 247.

(i) Cro. Eliz. 196. 3 Keb. 153. 1 Vin. Ab. 553. Sty. 169. 176. Palm. 529. *Suede v. Badley*, 3 Buls. 74.

cular nature of such specific prejudice will be hereafter considered (*k*).

Although the numerous decisions upon the subject seem to leave no doubt that words reflecting upon a party's present title must, to give a right of action, be attended with special damage, it does not follow as an immediate and necessary consequence of this doctrine, that imputations immediately tending to defeat the prospects of an heir apparent, are not in themselves actionable; though it appears at first sight somewhat strange to say that it can be considered more prejudicial to impeach a title resting merely in expectancy, than to derogate from one already existing. There is, however, a plain line of distinction between the two cases. Where lands have already descended to the heir, to call him bastard, can work little prejudice; the false imputation cannot divest the estate, though it may involve the owner in litigation, for which special damage he is entitled to his remedy; but reflections of this nature, when cast upon an heir-apparent, may produce consequences infinitely more serious, for they may induce the ancestor to disinherit the progeny which he conceives to be spurious.

In the former case the evil resulting from the

(*k*) See title Special Damage.

slander can be but slight and temporary, in the latter it may prove utterly irremediable. The cases relating to words of the latter description are of considerable antiquity and of rare occurrence, and though they certainly carry the doctrine of presumptive and anticipative loss to a great extent, yet they seem to be supported and warranted by the application of sound and general principles to the peculiar exigency of the case.



## CHAPTER V.

*Where the Slander is propagated by Printing,  
Writing, or Signs.*

BESIDES the communications which have been enumerated under the preceding divisions, many have been deemed to be intrinsically actionable, although unattended with special damage, on account of the *mode* in which they have been effected.

Observations upon this class of cases, relate, either to the *reasons* and *authorities* for this distinction, or to the *extent* to which it has been carried.

First, as to the *reasons* and *authorities* upon which the distinction is founded.

It has been said (a) that "slander in writing has at all times, and with good reason, been punished in a more exemplary manner than slanderous words, for as it has a greater tendency to provoke men to breaches of the peace, quarrels, and murders, it is of much more dangerous consequence to society. Words, which are frequently the effect of a sudden gust of passion,

(a) 6 Bac. Ab. 202, tit. Slander.

may soon be buried in oblivion ; but slander which is committed to writing, besides that the author is actuated by more deliberate malice, is for the most part so lasting as to be scarcely ever forgiven."

And, that "(b) written slander hereby receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation, and to continue longer and propagate wider and farther than any other scandal."

These reasons embrace three distinct points :

1. The greater degree of danger to the public peace.
2. The greater degree of malice in the author of the scandal.
3. The increased detriment to the object of the slander from its more extended circulation and duration.

In the first place, although the apprehension of danger to the public peace may furnish a sufficient ground for subjecting the publisher of a libel to penal visitation, that is a consideration which cannot at all affect the right to a civil remedy by action.

In the next place, it is clear that written slander may evince a higher degree of deliberation, and therefore of malice, than that which is merely oral ; it may, however, be doubted whether that

(b) 4 Bac. Ab. 449. 5 Co. 125. Ld. Ray, 416. 12 Mod. 219.

superior degree of malice constitutes a sound and well principled distinction between oral and written slander.

As far as regards the intention of the publisher, it seems to be certain, that malice, in law, is sufficient to support the action; that is, a party is liable if he voluntarily publish that which is injurious to another, and occasions damage to him without legal excuse (c). Whether, then, the calumniator speak or write that which is injurious to another, malice in law equally exists, and the mere degree of malice, however it may affect the question of damages, does not, in principle, constitute a distinct limit between that which is actionable and that which is not so.

Is then the reason for making written defamation actionable without special damage, where an oral communication would not have been so, the increased detriment which may probably arise to the party, in consequence of the means of publication which have been resorted to?

Such a consideration obviously applies rather to the quantum of injury sustained than to the actual existence of damage; and if any legal damage can, in any case, be presumed to have arisen from the publication of written slander, must not a similar presumption obtain, though (it may be) to an inferior extent, when the very

(c) Vide Preliminary Discourse, *infra* tit. Intention, and *supra*, p. 9.

same matter is published orally? How do the cases differ but in degree? The extent of mischief merely affects the quantum of damages, and not the right of action. If damage to an amount which can be estimated by a jury has been sustained, by publishing the scandal to a hundred persons, may not the damage be also estimated where the publication has been limited to ten? Whether a greater degree of damage will accrue from written than from oral slander must be casual and uncertain; words spoken to a multitude, may be more likely to injure their object, than if they had been communicated by writing to one or a few individuals.

It is, however, to be recollected, that the very presumption itself, the limitation of which gives rise to this difficulty and apparent inconsistency, is purely artificial and arbitrary, and consequently its limits are naturally of the same description.

From the exigency of the case, damage is presumed without proof, that is, the communication is deemed to be a substantive ground of action not in all cases, for so wide a presumption would too much encourage a spirit of vexatious litigation, but in cases where the necessity for making such presumption is urgent and apparent.

The principle, then, being once admitted, that damage may, in cases of exigency, be presumed, and an opposite principle of public policy re-

quiring that such a presumption ought not to obtain generally, but should be limited and restrained, it is evidently a mixed question of expediency, arising from the particular nature of any class of cases on the one hand, and of public policy on the other, what limitation shall be applied to them. And consequently, although if the question had depended wholly upon intrinsic reasons, such a distinction between oral and written slander might have been deemed incongruous; it cannot be so regarded, when it is considered that it depends partly on considerations of extrinsic policy, and it may obviously consist well with sound legal policy, to extend the remedy where the defamation is in writing, and therefore capable of an extensive, permanent, and mischievous diffusion, beyond those limits which are assigned in case of mere oral communications.

Whether such a distinction can be supported on any just grounds of reason or convenience has been the subject of much controversy; in the last case in which the subject was judicially considered, the court intimated that they supported the rule on the ground of precedent only (s).

The number of actual decisions founded upon the difference between oral and written slander is exceedingly small; but the distinction itself has

(s) *Thorley v. Lord Kerry*, 4 Taunt. 355, *infra*, 162.

been very frequently collaterally countenanced and recognised by most able and accomplished judges, and is now fully established.

It appears to have been held in very early times, that a libel (c) on the character of a private individual was punishable by way of indictment.

Sir Edward Coke, in his third Institute (d), cites a record of the conviction of Adam de Ravensworth, who was indicted in the King's Bench, in the reign of Edward III. for the making of a libel in the French tongue against Richard of Snowshall, calling him therein Roy de Raveners, &c. and adds, "so a libeller, or publisher of libel, committeth a public offence and may be indicted thereof at Common Law."

This, indeed, was a criminal proceeding, and no instance of a civil action in case of libel appears till long after; it seems, however, to have been frequently held (e), that where a party is indictable for any written defamation, an action is also maintainable at the suit of the party injured.

(c) It is to be recollected that the term LIBEL, in the following pages, is used to signify any writings, pictures, or other signs, tending to injure the character of an individual, or to produce public disorder.

(d) 74.

(e) Skin. 123. 2 Wils. 204. 4 Com. Dig. tit. Libel. C. 3. 6 Bac. Ab. tit. Slander, 202. 3 Bl. Comm. 125. 2 Camp. C. 511. It has, however, been said, that in some instances a libel may be indictable, although it be not actionable. 3 Mod. 139. Com. Dig. Libel, A. 2.

In the case of *Dr. Edwards v. Dr. Wooton* (f) in the Star-chamber, it appeared that Dr. Wooton had written to Dr. Edwards a letter, containing scandalous matter, to which he had subscribed his name, and that he had likewise published and dispersed a number of copies of the same letter. And it was resolved, by the Lord Chancellor Egerton, the two Chief Justices, and the whole court, that this was a subtle and dangerous kind of libel, inasmuch as the writing a private letter to another *without other publication*, would not support an *action on the case*, but that when published to others, to the *scandal of the plaintiff*, as it had oftentimes been adjudged, *an action lieth*. And it was said, that although the defendant had subscribed his name to the letter, yet since it contained scandalous matter, it was to be considered in law as amounting to a libel. From this case, though the contents of the letter in question do not appear, the opinion of the Lord Chancellor and the two Chief Justices may be collected, that generally, scandalous matter published in writing was a ground of action.

Peacock (g) exhibited his bill against Sir George Raynal in the Star-chamber, for a libel written under these circumstances :

The plaintiff was heir general to Richard Peacock, who was of the age of 86 years, and had

(f) 12 Rep. 35.

(g) 2 Brownl. 151.

lands of inheritance to the value of £800 a-year; the defendant, who had married the daughter of Sir Edward Peacock, who was a younger brother of Richard Peacock, wrote a letter to Richard Peacock, informing him, that the plaintiff was not the son of a Peacock, and was a haunter of taverns, and that divers women had followed him from London to the place of his dwelling, and that he had desire to hear of the death of the said Richard, and that all the inheritance would not be sufficient to satisfy his debts, and many other matters concerning his reputation and credit. And it was agreed that this was a libel, and for that the defendant was fined to £200, and imprisonment, according to the course of the court; and the plaintiff let *loose to the Common Law for his recompence* for the damages which he had sustained.

In the case of *King v. Sir Edward Lake* (h), the libel was contained in an answer to a petition preferred by the plaintiff to the House of Commons, and consisted of many general reflections upon the conduct of the plaintiff. After verdict

(h) Hardr. 470. See also *Sir Baptist Hicks's case*, Hob. 215. *King of Gray's Inn v. Sir E. Lake*, 2 Vent. 28. *Harman v. Delany*, Str. 888. The court, in the latter case, observed, that if bare words affecting a man in his trade were actionable, it would be much stronger in the case of a libel in a public newspaper, which is more diffusive.



for the plaintiff, it was moved in arrest of judgment, that the terms of the publication were too general to support an action; but it was said by Hale, Chief Baron, that "Although such general words *spoken once*, without *writing* or *publishing* them, would not be actionable, yet here they being written and published, which contains more malice than if they had been once spoken, they are actionable."

In the case of *Sir J. Austen v. Col. Culpepper* (i), the defendant had forged an order of the Court of Chancery, containing many defamatory reflections upon the plaintiff, and at the bottom had drawn the form of a pillory, and subscribed to it the words, "For Sir J. Austen and his witnesses by him suborned."

It was contended that the action was not maintainable, since no certain slander was imputed by the words, and that if the words would not support the action, the representation could not, since it was not to be inferred that the parties were perjured, and that though for setting up horns, &c. for the purpose of ridicule, an indictment lay, yet that no action was maintainable; but the court held that *an action* in such cases was maintainable, as well as an *indictment*, and referred to the case of *Col. King v. Lake* (k),

where the plaintiff had judgment in the Exchequer. And the court added, that to *say* of any one that he is a dishonest man, would not be actionable; but that to *publish* it or *put it on the posts* would be actionable, and the plaintiff had judgment.

In the case of *Cropp v. Tilney* (l), it was said by Holt, C. J. "Scandalous matter is not necessary to make a libel, it is enough if the defendant induce *an ill opinion to be had of the plaintiff, or make him contemptible and ridiculous*; as for instance, an action was brought by the husband for riding Skimmington (m) and adjudged that it lay, because it made him ridiculous and exposed him."

In *Bradley v. Methwyn* (n), which was an action on the case for a libel, Lord Hardwicke, C. J. observed, that "The present case is not for words, but for a libel, in which the rule is different, for some words may be actionable or prosecuted by way of indictment, which would not be so if spoken only, for the crime in a libel does not arise merely from the scandal, but from the tendency which it has to occasion a breach of

(l) 3 Salk. 226.

(m) *Mason v. Jennings*, Sir T. Ray. 401. contra. Sed vid. 1 Show. 314.

(n) Selwyn's Ni. Pri. 1st Ed. 925. n. 2. B. R. M. 10 G. 2. MSS.

the peace, by making the scandal more public and lasting and spreading it abroad, which was determined in this court in the case of *King v. Griffin*. Hil. 7 G. II."

In *Villers v. Monsley* (o), the libel charged the plaintiff with having the itch: upon motion in arrest of judgment, Wilmot, C. J. observed, "If any man deliberately, or maliciously, publish any thing in writing concerning another which renders him ridiculous, or *tends to hinder mankind from associating or having intercourse with him*, an action well lies against such publisher."

Bathurst, J. "I wish this matter was thoroughly gone into and more solemnly determined; however, I have no doubt at present, but that the writing or publishing any thing which renders a man ridiculous is actionable. I repeat it, I wish there were some more solemn determination that the writing and publishing any thing which tends to make a man ridiculous or infamous ought to be punished."

Gould, J. "What my brother Bathurst has said is very material; there is a distinction between libels and words: a libel is punishable both criminally and by action, when speaking the words would not be punishable either way; for speaking the words rogue and rascal of any one,

an action will not lie, but if those words were written and published of any one, I doubt not an action will lie. I think the publishing any thing of a man that renders him ridiculous, is a libel and actionable." And judgment was given for the plaintiff by the whole court, without granting any rule to show cause.

In *J. Anson v. Stuart* (p) the action was brought in the Common Pleas, for publishing in the *Morning Post*, that "The plaintiff was at the head of a gang of swindlers, a common informer, and had been guilty of deceiving and defrauding divers persons with whom he had dealings and transactions." The plaintiff demurred specially on account of the generality of the defendant's plea, and judgment having been given for the defendant below, the plaintiff carried the matter, by writ of error, into the Court of King's Bench, where the same causes were assigned for error, which before had been alleged as grounds of special demurrer.

The defendant further contended, that the declaration was insufficient, as the words "common informer" were not actionable, and the term "swindler" was not a legal term of which the law could take notice. But Buller, J. observed, "The objection afterwards taken to the declara-

tion is, that the term 'swindler' is too general, and cannot be legally understood, but Mr. J. Aston formerly held otherwise, for he said that the term swindling was in general use, and that the court could not say they were ignorant of it. But at all events we cannot say upon this record, that we do not understand the import of it, for it is explained to be 'defrauding divers persons.' The declaration contains as libellous a charge as can well be imagined."

This case cannot it seems be considered as decided upon the distinction in question, since it seems to have been the opinion of Mr. J. Buller, that the term "swindler," as explained by the subsequent words, was actionable without reference to the mode of publication (*q*).

Zenobio brought an action against Axtell (*r*) for publishing in the newspaper, called the *Courier de Londres*, the following paragraph,—“The late famous Bishop of Autun, to the great satisfaction of all honest men, has just received an order to quit England: the same compliment has been paid to an adventurer, a great gambler, who calls himself the Count Zenobio.” After verdict for the plaintiff, the defendant contended, in arrest of judgment, that the publication was not libel-

(*q*) In *Savile v. Jardine*, 2 H. Bl. 531. it was held that the term "swindler" was not actionable.

(*r*) 6 T. R. 162.

lous; but as there was another objection, which was fatal to the declaration, the court did not give any opinion as to the actionable quality of the words.

In *Bell v. Stone* (s), the defendant wrote the following letter concerning the plaintiff, who was a land-surveyor, to one N. B. to whom the plaintiff owed a large sum of money:

"After the communication I had with your son in your absence, I but little thought you would have been made the dupe of one of the most infernal villains that ever disgraced human nature; but I suppose you were deceived by those whom you thought well of, and whom he will deceive if they will give him an opportunity; I am told they are respectable, and how they can be connected with him is the most astonishing thing to me. Mr. H. writes me you called upon him, (meaning the plaintiff,) on the subject of your account, for which the villain gave you his note at five months." Special damage was laid in the declaration, but none being proved at the trial, the learned Judge who tried the cause was of opinion that the letter, unsupported by special damage, was not actionable, and directed a verdict for the defendant. The counsel for the plaintiff, however, contending

(s) 1 Bos. & Pul. 331.

that the letter itself was actionable, it was left to the jury to say what damages they would give, supposing the plaintiff entitled to recover, and they answered, one shilling. A rule was obtained to show cause why the verdict for the defendant should not be set aside, and a verdict entered for the plaintiff, on the count containing the letter, for one shilling, on the ground that though the words in that count might not be actionable if only spoken, yet that being committed to writing they were so.

Le Blanc, Serjt. was to have shown cause against the rule, but the court expressing themselves clearly of opinion, that *any words written and published, throwing contumely on the party, were actionable*, the learned counsel declined arguing the point, and the rule was made absolute.

Whatever of doubt might, notwithstanding the previous authorities, seem still to have attached to this question, has been removed by the decision in the Exchequer Chamber, in the case of *Thorley v. Lord Kerry*. (t). Lord Kerry, (the plaintiff below and defendant in error,) founded ~~his~~ action upon a libel, charging him with being a hypocrite, and with having used the cloak of religion for unworthy purposes. He obtained a verdict with £20 damages, and had judgment in the King's Bench without argument. A writ of

(t) 4 Taunton, 355.

error was brought in the Exchequer Chamber, and after very able arguments, in which all the previous authorities were considered, judgment was finally given for the defendant in error. Sir J. Mansfield, C. J. in delivering the opinion of the court, stated that the words, had they merely been spoken, would not have been actionable, and after expressly repudiating any distinction in principle between oral and written scandal, intimated that the judgment of the court in favour of the defendant in error, was founded entirely on the previous authorities, which established a rule too inveterate to be overturned (*u*).

(*u*) His lordship, in giving judgment, observed,—“There is no doubt that this was a libel for which the plaintiff in error might have been indicted and punished, because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies: and I should have thought that the peace and good name of individuals were sufficiently guarded by the terrors of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action; but the question now is, whether an action will lie for these words so written, notwithstanding that such an action will not lie for them if spoken; and I am very sorry it was not discussed in the Court of King’s Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action between written and parol scandal. For myself, after having heard it extremely well



It is probable that in early times there was no difference, as far as concerned civil actions, between verbal and written slander; no distinction

argued, and especially in this case by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged that, in the old books and abridgments, no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognised by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action, for words spoken in the cases of special damage,—of words spoken of a man in his trade or profession,—of a man in office,—of a magistrate or officer; for all these an action lies. But for more general abuse spoken, no action lies. In all the arguments, both of the judges and counsel, in almost all the cases in which the question has been whether what is contained in a writing be the subject of an action or not, it has been considered whether the words if spoken would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace, but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So it is argued, that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange concerning a merchant in

is made between them either in the statutes of *Scandalum Magnatum* or in the older cases relating to the subject.

The general rule was probably imported from

London, may be much more extensively diffused than a few printed papers dispersed or a private letter; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal, but that distinction has been established by some of the greatest names known to the law, Lord Hardwicke; Hale, I believe; Holt, C. J., and others; Lord Hardwicke, C. J., especially has laid it down, that an action for a libel may be brought on words written, when the words if spoken would not sustain it. Comyns. Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says there is a distinction between written and spoken scandal, by his putting it down there, as he does, as being the law; without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken; upon these grounds, we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken." See also the opinion of the judges in the case of *Macgregor v. Thwaites*, 3 B. and C. 24.

the civil law. Bracton lays down the law nearly in the language of the Institutes: *actio injuriarum competit ei qui contumeliam vel injuriam passus est* (x). It may be inferred, from the stat. of Circumspectè agatis, that in the reign of Ed. 1. actions for damages, in case of defamation, were common in the temporal courts (y). Whatever may have been the ancient rules of law (z), with regard to slander, they were afterwards relaxed (a) or contracted, as the courts deemed it convenient, until as far as regards oral slander, they were moulded into their present form.

There was, however, little necessity for visiting written or printed, as contradistinguished from oral slander, with either civil or penal censures, until the art of printing was invented, and learning had become more general. The offence of libel fell principally under the jurisdiction of the Star Chamber, which, in part, at least adopted the rules of the civil law, and which, when that jurisdiction was abolished, were imported into the common law practice.

(x) Bracton de Actionibus, f. 104. Again, he says, *Facta puniuntur ut furta, homicidia; scripta, ut falsa et libelli famosi*. Ib. f. 105.

(y) Et in causâ diffamationis concessum fuit alias, quod placita illa teneantur in Curia Christianitatis dummodo non petatur pecunia sed agatur ad correctionem peccati.

(z) Vaughan, C. J. 2 Vent. 28, observes, "In ancient books we do not meet with an action for words unless the slander concerned life."

(a) Supra, 12, 13, &c.

The authorities already cited leave little to be said in relation to *the extent of the action* for slander communicated by means of writing, printing, pictures, or other signs.

According to Lord Coke (y), every infamous libel is either *in writing*, or *without writing*. A scandalous libel in writing is, when an epigram, rhyme, or other writing, is composed or published to the scandal or contumely of another, by which his fame or dignity may be prejudiced.

Thus in the case of *Cropp v. Tilney* (z), already cited, Lord C. J. Holt said, that scandalous matter was not necessary to make a libel, that it was enough if the defendant induced an ill opinion to be had of the plaintiff, or made him contemptible and ridiculous. So according to the doctrine laid down in *Villars v. Monsley* (a), the publishing any thing concerning another which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, is actionable. And, therefore, to publish in writing of another that he is a rogue or a rascal,

(y) 5 Rep. 125. 3 B. & C. 33, 4.

(z) 3 Salk. 226. See also *Villars v. Monsley*, 2 Wilson, 403. An action is maintainable for slander, either written or printed, provided the tendency of it be to bring a man into hatred, contempt, or ridicule. Per Bayley, J. in *Macgregor v. Thwaites*, 3 B. & C. 33.

(a) 2 Wils. 403.

swindler or villain (*a*), is actionable, although the terms would not have been actionable had they been merely spoken. So it is to tax a man by such means with want of honesty, civility, humanity (*b*), or veracity (*c*).

But where the defendants posted up, in a public room, the following notice, "The Rev. J. Robinson (the plaintiff) and Mr. J. K., inhabitants of this town, not being persons that the proprietors or annual subscribers think it proper to associate with, are excluded this room:" it was held that the publication was not actionable. And the ground of this decision seems to have been this, that an imputation of such a nature is not actionable unless it represent the plaintiff as an improper person for *general* society, but that the alleged libel did not go to that extent; it merely asserted the opinion of the defendants, that the parties excluded were not proper persons to be associated with by them, and that might proceed from reasons which did not at all affect or impeach the moral character of the parties (*d*).

(*b*) *Villers v. Monsley*, 2 Wils. 403. *J. Anson v. Stuart*, 1 lb. *Bell v. Stone*, 1 B. & P. 331.

(*c*) Ray, 201.

(*d*) As by publishing of a tradesman, that he shoots out of a leathern gun. *Harman v. Delany*, 2 Str. 898. *Raymond*. 289. *Fitzg.* 121.

(*e*) *Robinson v. Jermyn*, 1 Price, 11.

The libel *without writing* may be,

1st. By pictures, as to paint the party in any shameful or ignominious manner.

2ndly. By signs, as to fix a gallows, or other reproachful or ignominious signs, at the party's door, or elsewhere.

Upon the whole, it may be collected; that any writings, pictures, or signs, which derogate from the character of an individual, by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, are actionable, without proof of special damage; in short, that an action lies for any *false, malicious, and PERSONAL imputation, effected by such means, and tending to alter the party's situation in society for the worse.*

This rule, though apparently very wide and comprehensive, cannot be considered to be more extensive than the justice of the case demands. No man, abstractedly, has a right to lessen the comforts or enjoyments of another; and when he does it deliberately, wantonly, and maliciously, it would be an insult to common sense to contend, that he is not bound, upon the plainest grounds of policy and justice, to make compensation for the mischief so occasioned: and no inconvenience can result from the extent of the rule: it must be recollected, that the only question at

present is, as to the nature of the damage which must have been sustained to make the scandal actionable: this damage is, however, but one of two essential requisites for the supporting an action. To render the right complete, such damage must have been occasioned, as will afterwards be seen, by the malicious act of the defendant. This further requisite, of *malice*, that is of malice in the *legal sense* of the term, precludes litigation in all cases where the party has acted in the discharge of any legal or moral duty, or in the fair and conscientious performance of his part in any transaction arising out of the ordinary business of life, without a deviation for malevolent purposes, and confines the action to those instances in which the mischief is attributable either to mere malice of heart, or to a wanton and guilty disregard of the feelings and interests of others.

It is said, by the learned author of the Commentaries, that (*f*), "as to signs or pictures, it seems necessary always to show, by proper innuendos and averments of the defendant's meaning, the import and application of the scandal, and that *some special damage has followed*; otherwise it cannot appear that such libel by pictures, was understood to be levelled at the plaintiff, or that it was attended with *any actionable consequences*." It seems, however, to be very

(*f*) 3 Bl. Com. 126.

difficult to conceive any sound distinction between written and painted libels.

A man may be as successfully exposed to ridicule by a caricature painting, as by any written misrepresentation ; and the object of the defendant may be as clearly manifested in the latter case, as the former. The difficulty, indeed, of proving the plaintiff to be the person aimed at, may, in some instances, be greater in the latter case ; but when the doubt as to the defendant's application of the calumny has been overcome, there seems to be no room for further distinction.

The pencil of the caricaturist is frequently an instrument of ridicule more powerful than the press ; and it is not easy to conceive an imputation which an ingenious artist would not be able successfully to communicate to minds of even the meanest capacity. A man may be as effectually held up as the object of ridicule, contempt, or hatred, by means of a picture, as by the most laboured form of words : in legal consideration, the only question is, whether the mode of defamation which has been adopted be capable of conveying that meaning which is detrimental to the plaintiff ? If, in fact, such modes be equally capable of so doing, equally distributable, and equally durable,—in short, equally mischievous in every respect, they cannot be considered as distinguishable, for legal



purposes, upon any principle of reason and good sense ; and no such distinction is to be found in the reports. It was expressly held by Holt, C. J. that "In case upon libel it is sufficient if the matter be reflecting (*g*) ; as *to paint* a man in any disgraceful situation."

The plaintiff (*h*) brought an action of trespass against the defendant for destroying a picture of the plaintiff's. Upon the trial it appeared that the picture in question, entitled *La Belle et La Bête*, was a caricature representation of a gentleman and his wife, who was sister to the defendant, and that it had been publicly exhibited for money till the defendant cut it in pieces. The plaintiff insisted that he was entitled to the full value of the picture, together with a compensation for the loss of the exhibition. The defendant contended that it was a public nuisance, which every one had a right to abate by destroying the picture.

Lord Ellenborough, C. J. "The only plea upon the record being the general issue of 'not guilty,' it is unnecessary to consider whether the destruction of this picture might or might not have been justified. If it was a libel upon the

(*g*) 11 Mod. 99. See also 2 Hawk. Pl. C. c. 73. s. 2. 5 Co. 125. Skinner, 123. 3 Keb. 378.

(*h*) *Du Bost v. Beresford*, 2 Camp. Rep. 511.

persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition; and the plaintiff was both *civilly* and *criminally* liable for having exhibited it."

There remains a class of communications differing from those last adverted to, and which, though accompanied with circumstances of cooler deliberation and more settled purpose than words merely spoken, are not calculated to produce such lasting and widely extended consequences as those effected by writings or pictures.

The vulgar custom of riding Skimmington (i), and the practice of carrying or burning the effigies of persons intended to be held out as public objects of disgrace and ridicule, are instances of this description. The impressions made by such proceedings are naturally more lasting, and are likely to produce a greater degree of mischief than words merely spoken; and yet the calumny is not so durable as if it had been conveyed in print or in writing. As, however, these are means by

(i) Supra. See Lord Holt's dictum in *Cropp v. Tilney*, 3 Salk. 226. And see *Austin v. Culpepper*, 1 Show. 314, where the court cited the case of *Sir William Bolton v. Dean*, where an action was maintained for scandalizing the plaintiff, by carrying a fellow about with horns, bowing at the plaintiff's door, &c.

which a man may be rendered, in many instances, contemptible and ridiculous, and in others may be exposed to the serious effects of popular indignation and resentment,—as the act of the defendant is more studied and deliberate, and the consequences more mischievous than those likely to be occasioned by mere oral slander, it seems to be clear that such representations are actionable, as falling within the same consideration with the other cases which have formed the subject of the present chapter.

Thus an action has been supported for setting up a lamp adjoining to the dwelling-house of the plaintiff, and keeping it burning in the day-time, with intent to defame the plaintiff as the keeper of a brothel (*k*).

(*k*) *Jefferies v. Duncombe*, 11 East, 226. and see *Spall v. Massey*, 2 Starkie's C. 559.

## CHAPTER VI.

*Of Scandalum Magnatum.*

WORDS spoken in derogation of a peer or judge, or other great officer of the realm, are usually called *Scandalum Magnatum*; and though they be such as would not be actionable when spoken of a private person, yet when applied to persons of high rank and dignity, they constitute a more heinous injury, which is redressed by an action on the case founded on many ancient statutes, as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on the behalf of the party to recover damages (a) for the injury sustained.

Under this division will be considered,

1. The grounds of the action.
2. The parties entitled to maintain it.
3. The nature of the words which will support it.

The statute (b) 3 Ed. 1. c. 34. after premising

(a) 3 Blac. Com. 128.

(b) For the history of these statutes, see 2 Mod. 152. Barrington on the Penal Statutes. 3 Reeve's Hist. and 1 Parl. Hist.

that "Forasmuch as there have been oftentimes found in the country devisors of tales, whereby discord, or occasion of discord, hath many times arisen between the king and his people, or great men of the realm," enacts, "that from henceforth none be so hardy to tell or publish any *false news* or tales, whereby discord, or occasion of discord, or slander, may grow between the king and his people or the great men of the realm ; and he that doth so, shall be taken and kept in, until he hath brought him into court which was the first author of the tale."

By 2 R. 2. st. 1. c. 5. "Of devisors of *false news* and of *horrible and false lies*, of prelates, dukes, earls, barons, and other nobles and great men of the realm ; and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and of other great officers of the realm, of things which by the said prelates, lords, nobles, and officers aforesaid, were never spoken, done, nor thought, in great slander of the said prelates, lords, nobles, and officers, whereby debates and discords might arise betwixt the said lords, or between the lords and commons (which God forbid), and whereof great peril and mischief might come to all the realm, and quick subversion and destruction of the said realm, if due remedy be not provided. It is straitly defended upon grievous

pain, for to eschew the said damages and perils, that from henceforth none be so hardy to devise, speak, or to tell any false news, lies, or other such false things, of prelates, lords, and of others afore-said, whereof discord or any slander might rise within the said realm; and he that doth the same shall incur and have the pain another time ordained thereof by the statute of Westminster the first, which will, that he be taken and imprisoned till he have found him of whom the word was moved."

Also by the 12 R. 2. c. 11.—"Item. Whereas it is contained as well in the statute of Westminster the first, as the statute made at Gloucester, the second year of the reign of our Lord the king that now is, that none be so hardy to invent, to say, or to tell any false news, lies, or such other false things, of the prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, and stewards of the king's house, the justices of the one bench or of the other, and other great officers of the realm; and he that doth so shall be taken and imprisoned till he hath found him of whom the speech shall be moved. It is accorded and agreed in this parliament, that when any such is taken and imprisoned, and cannot find him by whom the speech be moved, as before is said, that he *be punished* by the advice of the council, notwithstanding the said statutes."

It does not appear to be very clear, whether, before these statutes, any words would have been actionable when applied to a peer or other person of high rank and dignity, which would not have been deemed so in the case of a private person (c).

In the case of *Ld. Townsend v. Dr. Hughes* (d), the words were, "He is an unworthy man, and acts against law and reason;" and Scroggs and Atkins, justices, were of opinion that by the Common Law no action would lie, though such words were spoken of a peer; but North, C. J. considered the words to have been actionable at Common Law; and held, that no words would be actionable under the statute which were not so at Common Law.

Whether such a distinction prevailed or not at Common Law, is at present a matter of curiosity rather than of practical importance, for it has been established by a long train of decisions, that the distinction, if not created, has at all events been considered as warranted, by the operation of the statutes alluded to.

Upon these it has been held, that a remedy by action has been given to the great men of the realm, entitling them to a compensation in damages for injurious reflections upon their charac-

(c) See Buller L. N. P. 4. and 12 Co. 133.

(d) 2 Mod. 150.

ter, though the statutes themselves do not in express terms profess to bestow such a remedy. And this doctrine is founded upon the general rule, that whenever (*e*) a party is prejudiced by the doing of that which is prohibited by statute, he is entitled to damages. It is a remarkable circumstance, that from the time of passing the st. 12 Rich. 2. no civil action appears from the reports to have been founded upon it before the (*f*) thirteenth year of Henry the Seventh, comprising an interval of more than a century.

2. Next as to the parties entitled to maintain this action.

As the statute 2 R. 2. st. 1. c. 5. commences with an enumeration of persons inferior in rank to the king, it has been held, that the latter is not included (*g*) within the general words, "and great men of the realm." But (*h*) that he is included within the first of Westminster.

The action has been adjudged to extend to orders of nobility created since the making of these statutes; so that although the stat. 2 R. 2. specifically mentions dukes, earls, and barons only, a viscount (*i*) has been considered to be en-

(*e*) Keil. 26.

(*f*) *Ld. Townsend v. Dr. Hughes*, 2 Mod. 162. 10 Co. 75.

(*g*) *Crompt. Jur.* 19. 35. 6 *Bac. Ab.* 97. 12 Co. 133.

(*h*) 12 Rep. 133.

(*i*) *Cro. Car.* 136. *Palm.* 165.



titled to the action, though the title is of much (*k*) later creation.

It has been said (*l*), that a female, noble by birth, is not within the statute; but it is difficult to say upon what principle a peeress is excluded from the benefit of this statutable protection.

As the words derive their actionable essence from their application to the dignitaries specified in the statute, it must appear that the plaintiff held his rank at the time when the words were published (*m*).

By the act of union (*n*) with Scotland, it is enacted that all peers of Scotland shall also be peers of Great Britain, and enjoy all privileges as fully as peers of England, except of sitting in the House of Lords and the privileges depending thereon. Under this clause it has been determined, that a peer of Scotland is one of the magnates (*o*) to whom this statute extends; and it was said, that though it had been customary in such action to aver that the plaintiff had a *vote and seat in parliament*, such an averment was superfluous.

(*k*) John Beaumont, the first Viscount, was created such 18 H. 6.

(*l*) Crom. Jur. 35. 6 Bac. Ab. 97.

(*m*) Vent. 60.

(*n*) 5 Ann. c. 8. Art. 23.

(*o*) *Lord Falkland v. Phipps*, Comyn's Rep. 439. 1 Vin Ab. 549. pl. 22.

It seems that the action is maintainable by a Baron (*p*) of the Exchequer, though the statute mentions only Justices of the one bench or the other.

3. What words will support the action.

The grounds of the action and the effect of these statutes, underwent much learned discussion in the case of *Lord Townsend v. Dr. Hughes* (*q*), which has been already referred to. The action was there brought for speaking the words, "He is an unworthy man, and acts against law and reason." Upon not guilty pleaded, the cause was tried, and the jury gave, 4000*l.* damages. Upon motion in arrest of judgment, Serjeant Maynard, for the defendant, allowed that it was too late to contend that an action to recover damages was not maintainable under the statutes of Scandalum Magnatum, upon the principle before mentioned, that where a statute prohibits a thing prejudicial to another, the person prejudiced is entitled to recover damages; but he insisted that the words were not within the meaning of the acts; because, the term *unworthy* imported no particular crime,—that it was merely a term of comparison, and that instances of unworthiness might be alleged which would

(*p*) Vid. Pal, 565. 12 Co. 133.

(*q*) 2 Mod. 150.

not support an action; but that, if the plaintiff had been compared to any base and unworthy thing, the words would have been actionable: as in the *Marquis (r) of Dorchester's* case; of whom the defendant said, "There is no more value in him than in a dog." That to say a man acts against law and reason, is no scandal; a man who buries one of his family in linen acts against law, but that, if the penalty be satisfied, the law is so too. That no instance was given in which the plaintiff had acted against law, and therefore that the case was unlike the *Duke (s) of Buckingham's*, who brought an action for the words, "You are used to do things against law, and put cattle into a castle where they cannot be replevied;" for in that case, not only an usage was charged upon him, but a particular instance of oppression. That the words in question were uncivil, but not actionable,—that there were many authorities which shewed a peer not entitled to an action for every trivial and slight expression spoken of him. As to say of a peer, "He keeps none but rogues and rascals about (t) him, like himself," which words, in the opinion of Yelverton and Fleming, Justices, were not actionable.

(r) *Crom. Jur. of Courts.*

(s) *Hil. 16 C. 2. Roll. 1269.*

(t) *Earl of Lincoln's case, Cro. J. 196.*

That the statute was made to punish those who devised "false news, and horrible and false lies of any peer, &c. whereby discords might arise between the lords and commons, and great peril and mischief to the realm, and quick subversion thereof. But that it could not be contended; under the fair construction and intent of the act; that if one should say, "Such a peer is an unworthy man," the kingdom would be presently in a flame, and turned into a state of confusion and civil war; or, that the state would be endangered by saying of a peer, "he acts against the law." That the plaintiff was placed in no hazard by the words, nor in any wise damnified; he was not touched in his loyalty as a peer, nor in danger of his life as a subject; he was not thereby subjected to any corporeal or pecuniary punishment, nor charged with any breach of oath, nor any miscarriage in office.

It was answered by Pemberton, Serjt. that it was the end and object of these statutes to give a remedy against all *provoking* and *vilifying* words which were used before to exasperate the peers, and to make them betake themselves to arms, and to carve out their own remedy by the sword. That since the design of the statute was to prevent such practices, not only those words were to be considered as falling within their scope, which imported *great scan-*

*dal*, and for which an action lay at the common law, but even such things as savoured of any contempt of their persons, and such as brought them into disgrace with the commons, whereby they took occasion of prosecution and revenge. And he citēd *Lord Cromwell's case* (u), where the words were, "You like those who maintain sedition." *The Earl of Lincoln's case*, "My lord is a base earl, and a paltry earl, and keepeth none but rogues and rascals like himself."

The *Duke of Buckingham's case* (x), "He has no more conscience than a dog."

The *Marquis of Dorchester's case*, "He is no more to be valued than the black dog that lies there."

All which words had been held to be actionable, though not touching the persons in any thing concerning the government, nor charging them with any crime, but in point of dignity and honour.

Scroggs, J. observed, that "the words here laid are not so bad as the defendant might have spoken, but they are so bad that an action will lie for them; and though they are *general*, many cases may be put of general words which import a crime, and which have been adjudged actionable."

(u) 4 Co. 13. Cro. J. 196.

(x) Hil. 16. c. 2. Roll. 1269.

In the *Earl of Leicester's* case, "He is an oppressor," were held actionable.

And in *Lord Winchester's* case, "He kept me in prison, till I gave him a release," were deemed to be actionable, because the plain inference from them is, that he was an oppressor.

And so, in *Lord Abergavenny's* case, "He sent for me, and put me in Little Ease." It appears by all these cases, that the judges have always construed in favour of these actions; and this has been done in all probability to prevent those dangers which otherwise might ensue if the lords should take revenge themselves."

Atkyns, J. held, that under the construction of the statute, the words to be actionable must be *horrible* as well as *false*, and such as were punishable in the high commission court, which were enormous crimes. That the statute did not extend to words of a small and trivial nature, nor to all words which were actionable, but only to such as were of a greater magnitude, such by which discord might arise between the lords and commons, to the great peril of the realm, and such which are *great slanders* and *horrible lies*, which are words purposely put into this statute for the aggravation and distinction of the crime; and, therefore, such words as were actionable at the common law might not be so within this statute, because not horrible great scandals. The learned

judge also observed, that in the *Duke of Buckingham's* case (y), (which was the second which appears to have been determined in an action on the statute,) where the defendant said, "You have no more conscience than a dog;" and in the case of *Lord Abergavenny v. Cartwright*, "You care not how you come by goods," the words charged the plaintiff with particular matter, and did not rest barely upon opinion.

That in the case of the *Bishop of Norwich* (z), the words, you have writ to me that which is against the word of God, and to the maintenance of superstition," were held actionable, because they refer to his function, and greatly defame him. That in the case of *Lord Mordant v. Bridges* (a), the words "My Lord Mordant did know that Prude robbed Shotbolt, and bade me compound with Shotbolt for the same; and said, he would see me satisfied for the same, though it cost him an hundred pounds, which I did for him, being my master, otherwise the evidence I could have given would have hanged Prude," were held actionable; and that both in this, and in all the other cases which had been mentioned on the statute, and where judgment had been given for the plaintiff, the words had always charged him

(y) 4 Hen. 8. Crompt. Jur. 13.

(z) Cro. Eliz. 1.

(a) Cro. Eliz. 67.

with some particular fact, and were positive and certain ; but that where they were doubtful and general, and signified only the opinion of the defendant, they were not actionable. That the words in the case at bar neither related to the plaintiff as a peer, nor as a lord lieutenant, and charged him with no particular crime ; and that if the laws were expounded to rack people for words, instead of remedying one mischief, many would be introduced ; for in such case they would be made snares to men. He farther said, that it was fit the law should be settled by some rule, because it is a wretched condition for people to live under such circumstances as not to know how to demean themselves towards a peer ; and that since no limits had before been prescribed, it was fit there should be some then, and that the court should go by the same rules in the case of a peer as in that of a common person ; that is, not to construe the words actionable, without some particular crime charged upon the plaintiff, or an allegation of special damage.

North, C. J. and Wyndham, J. agreed with Scroggs, the former being of opinion, that all words reflecting upon a peer, as he is the king's counsellor, or as he is a man of honour and dignity, are actionable at the common law. That in many cases where a man should express his particular disesteem, an action would not lie, as if he



had said, "I care not for such a lord," but that words of general opinion and disesteem were actionable, as was held in the *Marquis of Dorchester's* case (b); and, by the opinion of North, C. J. and Wyndham and Scroggs, Justices, judgment was given for the plaintiff.

And in the case of the *Earl of Pembroke v. Staniel* (c), the words were, "The Earl of Pembroke is of so little esteem in the country, that no man of reputation hath any esteem for him; he is a pitiful fellow, and no man will take his word for two-pence, and no man of reputation values him more than I do the dirt under my feet;" and they were held to be actionable under the statute, though they would not have been so in the case of a private person.

And in the case of *Ld. Falkland v. Phipps* (d), the terms villain, villainous rogue, scrub, and scoundrel, were held actionable.

From these cases it appears, that *general expressions of contempt and disesteem, tending to degrade and vilify the characters of peers and great officers of the realm*, are actionable, as well as those which impeach their loyalty, or impute the commission of any criminal and disgraceful

(b) 1 Sid. 293.

(c) Freem. Rep. 49. 1 Vin. Abr. 549.

(d) Comyn's Rep. 439.

fact. Where words are spoken of a peer, which would be actionable as spoken of a private person, the plaintiff has it at his option (e) to proceed either upon the statute, or in the usual form of action.

The incidents peculiar to Scandalum Magnatum, as relating to the process, pleading, justification, &c. will be considered in common with the corresponding ones belonging to the proceeding at common law.

(e) Per Twisden. Freem. Rep. 49. pl. 58.

## CHAPTER VII.

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### *Special Damage.*

THUS far as to damage in law, that is, as to those communications which are deemed to be of so hurtful a nature, that the law *presumes* a consequent damage without actual proof. In all other cases, some actual specific damage, in fact, is essential to support an action.

Here two questions arise,

1. What, in legal contemplation, amounts to an actionable damage ?

2. How must such damage be connected with the slander, to constitute a ground of action ?

1. *What, in legal contemplation, amounts to an actionable damage ?*

The defendant's act affects either rights already acquired, or prevents the acquisition of some further benefit or advantage.

Where the plaintiff has been wrongfully charged with the commission of some crime, if the imputation rest as a bare charge, not officially made in the usual course of a criminal proceeding, the party, it seems, has a right to consider the ex-

pense and labour to which he is put for the purpose of manifesting his innocence as special damage.

As where the plaintiff, in consequence of an insinuation that he was guilty of murder, was obliged to have an inquest taken on the body of the deceased (*f*).

But if the defendant proceed according to the usual forms of criminal prosecution, though the plaintiff is entitled to recover damages for the scandal, vexation, and expense, brought upon him by an unfounded and malicious accusation, he must proceed either by an action of conspiracy or by a special action on the case, founded upon the criminal proceeding itself, and cannot recover (as will afterwards be seen) in a common action for any scandalous matter published in the course of such a prosecution (*g*).

Where a party is prevented from selling, exchanging, or making any advantageous disposition of lands, or other property, in consequence of the impertinent interference of the defendant, he may maintain an action for the inconvenience which he has suffered; but special damage must be shown; and the mere apprehension (*h*), that

(*f*) Per Lord Mansfield. *Peake v. Oldham*. Cowp. 277.

(*g*) 3 Bl. Com. 126. 10 Mod. 210, 219, 220. Str. 691.

(*h*) Cro. Eliz. 197. 1 Vin. Ab. 550, pl. 6. Yelv. 80. Cro. J. 642. contra. Et vide Cro. J. 397. Sir W. Jones, 196.

in consequence of the slander, the plaintiff's title may be drawn in question, will not support an action.

And it is not sufficient to show generally that the plaintiff intended to sell to any one that would buy, but he must prove that he was in treaty to sell them to some specific person (i), or at least that some one was deterred by the slander from making an offer. Neither will it suffice to show, that the value of the lands was lessened in people's opinions, but proof must be given of damage actually sustained. Where the alleged loss consists in the prevention of the sale of lands, it must appear that the words directly tended to defeat the plaintiff's title (k).

In *Sir W. Gerrard v. Dickenson* (l), it was said by Wray, C. J. that in all cases where one doth entitle a stranger, it is not actionable, except it be shown that some damage comes to the proprietor by it, viz. that he cannot let it or sell it, &c.

The defendant said (m), "M. has mortgaged all his lands for £100. and has no power to sell or let the same." And, because no special damage nor particular colloquium was laid of a

(i) *Manning v. Avery*, 3 Keb. 153.

(k) Burr. 2622.

(l) Cro. Eliz. 196.

(m) *Manning v. Avery*, 3 Keb. 153. 1 Vin. Ab. 553, pl. 21. Sty. 169. 176. Palm. 529.

treaty to sell them to any person certain, but only in general that he intended to sell it to any one that would buy, which is too general, judgment was stayed.

In *Elborow v. Allen* (n), the action was brought for the words, "He is but a bastard," spoken of the plaintiff, who had lands by descent; by means of which he was put to great expense to defend his title. And two of the justices, against the opinion of Doderidge, J. decided, that the words were actionable, the plaintiff having averred in his declaration that he was put to a great charge to defend his inheritance (o).

(n) Cro. J. 642.

(o) But it has been held, that to institute a civil suit, though there be no good ground for it, is not actionable, because it is a claim of right for which the plaintiff has found pledges, is amerciable pro falso clamore, and is liable to costs, and therefore that no action lies, unless the defendant be maliciously sued\*, with intent to imprison him for want of bail.

And it may be urged that the plaintiff is precluded from recovering from the person who spoke the words which brought his title into litigation, since, in contemplation of law, he has been already satisfied for the false claim.

There is, however, a distinction between an action against a former plaintiff, for making a false claim, and an action against one who, by a false and malicious suggestion, caused him to assert the false claim, in order to involve the former

\* See *Saville v. Roberts*. 1 Salk. 13. 4 Co. 9 Co. 56. b. 1 Roll. Abr. 112.

And next, where the plaintiff is prevented from acquiring some benefit or advantage.

In general, where the plaintiff is *hindered*, by *the mere wrongful act* of the defendant, from succeeding to any *preferment, benefit, or advantage* whatever, he may maintain an action for the special damage.

As, if a patron (*p*) intend to present a divine to a benefice, and the defendant say of him, "He is an heretick, or a bastard;" for which reason the patron refuses to present him, and he loses his preferment, an action is maintainable.

So, if the defendant say of a candidate for an office, that he is an ignorant man and unfit for the place, by means of which he loses it, an action lies (*q*).

defendant in litigation; for such a party has, by his malicious and impertinent act, subjected another to the trouble and anxiety of a suit, and being a wrong-doer, who has no colour of right, he stands in a different situation from the plaintiff in the former suit, who merely sought a remedy by legal means; and to constitute special damage, it is by no means essential that any legal right should have been abridged. One who does no more than the law permits may not be liable, and yet one who, by undue means, caused him so to act, may be responsible. Thus, if A. slander B. in a discourse with C., the patron of a living, and C. in consequence refuse to present B., no action lies against C., but an action lies against A., though B. never had any legal claim, and has lost no right defined by the law.

(*p*) 4 Co. 16.

(*q*) March. Rep. pl. 217. 1 Buls. 138.

So, where a servant or bailiff is prevented from getting a place (*r*).

Loss of marriage seems to have been always considered as a temporal damage (*s*), although the words themselves have imputed matter of mere spiritual cognizance.

In *Matthews v. Crass* (*t*), which was an action for words, occasioning loss of marriage; after verdict for the plaintiff, it was urged, on motion in arrest of judgment, that this was the first case where loss of marriage was ever laid for words spoken of a man, and therefore was not warranted by *Ann Davis's* case (*u*). But the court conceived it to be immaterial, in case of loss of marriage, whether the plaintiff be a man or a woman.

In order to support an action grounded upon the loss of marriage, it is necessary for the plaintiff to allege and prove that a marriage with some specific person (*x*) was in contemplation, and was hindered by the speaking of the words.

(*r*) Shepp. Coll. 192.

(*s*) *Davis v. Gardiner*. 4 Co. 16. Poph. 36. 1 Roll. Rep. 34, 35. 109. Mo. 409. Cro. Car. 155. Case of Sir C. Gerald's bailiff. Bull. N. P. 7.

(*t*) Cro. Jac. 323.

(*u*) 4 Co. 11. vide infra.

(*x*) 1 Roll. 36. l. 15. 1 Com. Dig. tit. Defam. D. 30.



The necessity of proving a specific loss, falls with peculiar hardship upon unmarried females, who are thereby frequently debarred from maintaining actions for imputations most unfounded and injurious. In no other case can it be more fairly presumed that the scandal, if believed, will produce detriment, than where an unmarried female is charged with incontinence: and therefore, in no other case is the plaintiff better entitled, in reason and good sense, to the benefit of that presumption, in order to obtain a remedy for the scandal, and, which is of infinitely more importance, an opportunity of fairly meeting and rebutting the calumny.

No species of slander can be more cruel and malicious in its origin, none more pernicious in its consequences: yet, unless some specific damage can be proved, or the charge be committed to writing, the suffering party, whose peace of mind is destroyed, and prospects ruined, has no appeal but to courts, whose powers, limited as they are, to the infliction of penance for the spiritual *benefit of the wrong-doer*, can administer no substantial relief or protection to the *party wronged*.

Yet it is this very jurisdiction of the ecclesiastical courts, which has frequently been assigned as a reason (though surely an inadequate one) why the temporal courts should not interfere to give a remedy in damages.

It has been said that were the courts of law in such cases to entertain an action, it would be productive of hardship to the defendant, who would be twice punished for the same offence, by an award of damages in the temporal, and by the infliction of penance in the spiritual court.

This mode of reasoning is evidently fallacious: if a man contrive, by one and the same act, to offend against religion, and to do a serious temporal injury to his neighbour; though the act be one and the same, it unites and comprehends offences wholly distinct, and it is absurd to say that the spiritual offence shall protect the offender from consequences merely temporal, and that, by rendering himself liable to a trifling penance, he shall rid himself of a load of temporal responsibility.

The objection, too, falsely assumes, that the payment of damages is in the nature of punishment; by the law of England, the amount of damages is in all cases to be measured by the temporal prejudice sustained by the plaintiff, and they are awarded without any regard to the penal correction of the defendant, or the reformation of his manners; the reason, at all events, is a strange one to have weighed in a court of law, whose records abound with cases, which prove, that for the same act a person may be both civilly and criminally responsible.

Such, however, is the law upon this point though formerly much doubt was entertained upon it.

In *Ann Davis's* case (y), the plaintiff declared that she was a virgin of good fame, &c. and that one Anthony Elcock, citizen of London, of the substance of £3000, desired her for his wife, and had thereon conferred with John Davis her father, and was ready to conclude it, when the defendant, knowing the premises, but intending to injure the said Ann, and to obstruct the said Anthony's proceedings, published of the said Ann these words, "I know Davis's daughter well, she dwelt in Cheapside, and there was a grocer there that did get her with child;" by which the said Anthony refused to take her to wife.

After verdict for the plaintiff, it was moved in arrest of judgment, that the words were not actionable, because the defamation was spiritual. But it was resolved by the whole court, that the action was maintainable:

1. Because, if the woman had a bastard, she was punishable by the statute of 18 Eliz. c. 3.

2. That if the defendant had charged her barely with incontinence, the action would have been maintainable, since the ground of the action

was temporal, namely, that she was defeated of her marriage.

But in subsequent cases (z) the first of the reasons given in *Ann Davis's* case was denied to be law; and it was said, that the sole reason on which the judgment rested was the loss of marriage.

In *Baldwin and his wife v. Flower* (a), it was held, that an action lay for calling the wife "whore," because, by such means, she might lose the communication and society of her neighbours.

In *Medhurst v. Balaam* (b), the plaintiff declared she had several suitors to marry her; and that the defendant said of her, "She is with child, and hath taken physic for it;" by which she became in disgrace, and lost the society of her neighbours. And it was adjudged that the action lay, though "no loss of marriage was alleged.

This doctrine has, however, been overruled in a variety of cases (c).

In *Ogden v. Turner* (d), Holt, C. J. observed, "To say of a young woman that she

(z) 1 Lev. 261. Sid. 397. Vent. 4.

(a) 3 Mod. 120.

(b) 1 Vin. Ab. 393. pl. 7. Sid. 397.

(c) 1 Lev. 261. 2 Keb. 451. 1 Sid. 396. Ld. Ray. 1004.

(d) Holt. R. 40.

had a bastard, is a very great scandal, and for which, if I could, I would encourage an action; but it is not actionable, because it is a spiritual defamation, punishable in the spiritual court."

In *Byron v. Emes* (e). A young unmarried woman had been charged with gross incontinency. After a verdict for the plaintiff, it was moved, in arrest of judgment, that the words were not actionable, because they were of spiritual cognizance, and that no temporal loss had accrued: that to say, "a woman has a bastard," was never actionable before the statute for the provision of bastard children; and that, since the statute, it had never been held actionable but where the party had been brought within the penalty of the statute, which is only where the bastard becomes chargeable to the parish; that these words were most scandalous of a young woman; and that, had it been *res nova*, perhaps an action would have lain, but that there were many authorities to the contrary. That it was a crime of which the spiritual court had consueance, and could censure; and that it was not reasonable that the party should be liable to ecclesiastical censure and an action too, on which account *Ann Davis's* case had been often shaken, and judgment was given for the defendant.

(e) 12 Mod. 106. 3 Will. 3.

For similar words in *Greaves v. Blanchet* (f), judgment, after verdict for the plaintiff, was arrested; the court observing, that they could not overthrow so many authorities, and that the reason was, that fornication was a spiritual offence, and that no action lay at Common Law for what the Common Law took no notice of.

In the above case (g) also, the court said, that if it were *res nova*, it were reasonable to make the words actionable, for no greater misfortune can befall a young woman, whose well doing depends upon her having a good husband, than to be reputed a whore; but the authorities are too many and great to run counter to them, the reason of them is, that fornication is a spiritual offence, not punishable at Common Law, and an action shall not lie for charging one with an offence of which the law takes no notice, without special damages; and if *Ann Davis's* case had been pursued as it had been contradicted, it would do.

From these and many similar authorities, it appears, that the judges have long ago felt themselves overpowered with the number of the decisions upon this point, constantly regretting that they were no longer at liberty to determine differently.

(f) Salk. 695. 6 Mod. 148.

(g) 6 Mod. 148.

Before this subject is dismissed, it may be proper to remark, that in the old decisions upon this point, the only question contemplated seems to have been, whether the words of incontinency (*h*) were actionable, as imputing *a crime*; and it does not appear to have been much considered, whether they were not actionable on the *broad plain ground* that they immediately tend to hinder the plaintiff's advancement in life by an advantageous marriage.

It may, perhaps, be too late to contend, that the plaintiff is entitled to recover upon this general principle; the courts, however, have manifested a desire to administer every relief in their power to plaintiffs of this description, so that the most trifling loss sustained in consequence of such slander, as of a dinner, or other hospitable but gratuitous entertainment (*i*), will entitle the party to her action.

And, in general, wherever a person is prevented by the slander from receiving that which would otherwise have been conferred upon him, though gratuitously, the special damage will support an action. As where, in consequence of a charge of incontinence, a dissenting preacher

(*h*) See the first resolution in *Ann Davis's* case, 4 Coke, 16.

(*i*) *Moore v. Meagher* in Error, 1 Taun. 39.

was prevented from preaching (*k*) and receiving voluntary donations from his congregation.

(*l*) So, the loss of particular customers by a tradesman is an actionable special damage.

(*m*) And it is immaterial in such case, whether the words relate to his business or otherwise.

A mere apprehension of ill consequences cannot constitute a special damage; so that it has been held to be insufficient for the plaintiff to allege, that in consequence of the words, discord happened between him and his wife (*n*), and he was *in danger* of a divorce.

Or, to allege that the plaintiff (*o*) was exposed to her parents' displeasure, and *in danger* of being put out of their house.

Or, to say he lost the affection of his mother (*p*), who intended him £100.

*2. How must the special damage be connected with the slander, to constitute a ground of action?*

It was said by Holt, C. J. that "At Common

(*k*) *Hartley v. Herring*, 8 T. R. 130.

(*l*) *Barron v. Gibson*, Ld. Ray. 831. Str. 566. Bull. N. P. 7.  
1 Lev. 140.

(*m*) 1 Lev. 140.

(*n*) 1 Roll. 34.

(*o*) *Barnes v. Bruddell*, 1 Lev. 261.

(*p*) Car. 1. 1 Com. Dig. tit. Defam. D. 30.



Law, if a man do an unlawful act, he shall be answerable for the consequences, especially where the act is done with the intent that consequential damage shall follow (q).”

But it is not essential that the damage should be the necessary and inevitable consequence of the slanderous words; it is sufficient, for instance, if they impose upon the plaintiff a violent and urgent motive for incurring expense.

In the case of *Peake v. Oldham* (r), Lord Mansfield expressed an opinion, that the expenses of an inquest incurred by a plaintiff, who had been wrongfully accused of murder, might be considered as special damage.

The rule appears to be, that *the damage must be the mere, natural, and immediate consequence of the wrongful act.*

The defendant asserted, that the plaintiff had cut his master's cordage (s); upon which the master discharged him, though he was under an engagement to employ him for a term. It was held by the court, that the discharge was not a ground of action; that the special damage must be the natural and legal consequence of the words spoken; and that the defendant was no more answerable for the discharge, than if, in conse-

(q) *Ld. Ray.* 480.

(r) *Cowp.* 277.

(s) *Vicars v. Wilcocks*, 8 East, 1.

quence of the words, other persons had assaulted and thrown the plaintiff into an horse-pond.

The damage must be attributable *wholly* to the words; so that, where the reason of a person's refusing to employ the plaintiff was founded, *partly* on the defendant's words, and *partly* on the circumstance of his having been previously discharged by another master, it was held that no action was maintainable (*t*).

And it has been said that (*u*), where, in consequence of the words, a third person has refused to perform a contract previously made with the plaintiff, and which he was in law bound to perform, no action is maintainable; for the plaintiff, in such case, is entitled to a compensation for the non-performance of the contract; and, were he allowed to maintain his action for the slander, he would receive a double compensation for the same injury: first, against the author of the slander; and secondly, against the person who had refused to perform his agreement.

This doctrine would, in many instances, be productive of hardship to the plaintiff: he may resort, it is true, to his legal remedy against the person refusing to perform his contract; but this can scarcely be considered as a full and real

(*t*) 8 East, 1.

(*u*) 2 Bos. & Pull. 284. 8 East, 1.

compensation to the party, who, by the defendant's wrongful act, has had a benefit in possession wrested from him, and converted into a bare legal right (*x*).

(*x*) Besides this, he may have been put to great trouble, and to some expense, in respect of which he could not obtain any compensation, in an action for the breach of contract. It is notorious, that no plaintiff, in such an action, recovers the whole of his costs. If it be said, that he does, in legal consideration, recover his full costs, it may be replied, that in such actions it is by no means essential that the special damage, which is necessary to support the action, should amount to strict legal damage. The loss even of a gratuitous donation, if it has been intercepted by means of the defendant's slander, is sufficient to support the action; and in *Peake v. Oldham*, Cowp. 277. Lord Mansfield held, that the expenses of an inquest, which had been incurred by the plaintiff in consequence of a slanderous imputation of murder, was special damage, yet there the plaintiff was under no legal obligation whatsoever to incur such expenses. If one man, by a wrongful and malicious act, is the immediate cause of another man's committing another wrongful act, to the injury of the same party, there seems to be no objection, on the score of legal policy or morality, to his recovering a satisfaction from each, proportioned to the extent of the damage occasioned by each: he does not, either in point of law or fact, recover a double remedy for the same injury. The damage immediately occasioned by the slander, that is, the loss of character and the loss of the immediate benefit of his contract, and the trouble and extra expense to which he must be put to obtain compensation for the breach of contract, is distinguishable from the damage arising from the breach of contract.

The defendant (*y*) having libelled a performer at a place of public entertainment, she refused to sing, and the proprietor brought his action on the ground of special damage, alleging that his oratorios had, in consequence of her absence, been more thinly attended. But it was held, by the learned judge who presided at the trial, that the injury was too remote; that if the performer was really injured, an action lay at her suit; and that it did not appear but that her refusal to perform arose from caprice or indolence.

If the objection were well founded, it would extend to the exclusion of an action to be brought by any servant who was under a contract to serve, though the words were in themselves actionable; for if an actual dismissal from service would not be an actionable damage by reason of the contract, there could be no sufficient *presumption of damage* to support the action. It would be absurd to sustain an action upon a mere presumption of evil consequences, and to deny it where the very consequences had resulted. It is also observable, that the objection is inconsistent with all the cases, many of which have occurred where the special damage has consisted of loss of marriage, where the party who, by reason of the slander, broke off the marriage, was under a promise to marry. Qu.; therefore vide *Morris v. Langdale*, 2 B. & P. 284. See also the case of *Newman v. Zachary Aley*n, 3. it was held, that case would lie for falsely representing to the bailiff of a manor, that a sheep of the plaintiffs was an estray, in consequence of which it was wrongfully seized. And see *Ld. Holt's observations*, ib.

(*y*) 1 Esp. R. 48.

The plaintiff having once recovered damages in an action for words, cannot afterwards recover an ulterior compensation for any loss subsequently resulting from the same words (z). Where the plaintiff (a), knowing the defendant's sentiments, procures the publication of that from which damage results, he will not afterwards be at liberty to ascribe his loss to the defendant's act, but be considered as the voluntary author of the mischief which follows.

(z) Bull. N. P. 7.

(a) 3 B. & P. 592. 5 Esp. R. 15.

## CHAPTER VIII.

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*Publication and Intention.*

HAVING thus considered the nature, quality, and consequences of the matter communicated, the next question, according to the elementary division already announced, is as to the act of communication by the defendant, and the *intention* with which he (a) made it.

It is, of course, essential to the production of any loss or damage to the plaintiff, that the slanderous matter should have been communicated or published to some third person; in this respect, civil differs from criminal liability, which, as will be seen, may be consummated by a publication to the party defamed without more; but, with the exception of the case of libel, the means of publication are indifferent, and do not affect the right of action.

(a) *Supra*, p. 5.

In the case of libel, it is sufficient if the defendant be the partial instrument of communication, either by assisting in its original construction or subsequent promulgation; if one party were to dictate, a second to write, and a third to distribute written or printed slander, the plaintiff would be left without remedy, unless each of these parties were to be considered as responsible for the whole effect produced.

The subject of publication will hereafter be discussed as a matter of evidence; assuming therefore, for the present, that some publication (*b*) has been made to a third person, with the defendant's knowledge, and through his procurement; the next point for consideration is—

The *intention* with which he published.

The intention of the publisher may be regarded either independently of the occasion of publishing and the collateral circumstances, or in connection with them.

First, independently of the occasion and circumstances.

It seems to be clear, as well upon legal principle as on those of morality and policy, that where the wilful act of publishing defamatory matter de-

(b) See *Baldwin v. Elphinstone*, Bl. Rep. 1037. *Phillips v. Jarwen*, 2 Esp. 624. *Edward's and Watton's case*, 4 Lev. 240. Hob. 62.

rives no excuse or qualification from collateral circumstances, none can arise from a consideration that the author of the mischief was not actuated by any deliberate and malicious intention to injure, beyond that which is necessarily to be inferred from the very act itself. For if a man wilfully does an act likely to occasion mischief to another, and to subject him to disgrace, obloquy, and temporal damage, he must, in point of law as well as morals, be presumed to have contemplated and intended the evil consequences which were likely to ensue.

To run the risk of effecting a serious injury to another, even from want of due care and attention, is necessarily an offence against the first principles of morality; and even were it otherwise, it would be highly impolitic and inconvenient, as a rule of law, to permit every man to destroy the characters of others, provided he was not actuated by motives of express malice, but acted without consideration, heedless of consequences.

Every legal analogy which can be called in aid suggests the same conclusion. According to the general and ordinary rules of law, a remedy is given for every injury, that is, in respect of every wilful privation of right, and throughout the whole of the wide range of decisions on the subject of injury to a man's person or property, there is, perhaps, not



one to be found where the liability to make compensation is not necessarily and immediately consequent upon a wilful privation of a recognized legal right, in the absence of a legal justification or excuse, arising from collateral circumstances. Thus, in every instance where a forcible injury is committed against the person or property of another, the actual intention of the author of the mischief is immaterial; it is sufficient that he did the act either wilfully, or even negligently and carelessly: no defence, in such cases, can be founded on the absence of an actual intention to effect the particular mischief, and none can be made in the absence of collateral circumstances, which furnish some legal justification or excuse. In all such cases, it is the policy of the law, to make the party who is in fault make compensation to the extent of the injury, which he has occasioned to one who was blameless; and the law not only considers him to be in fault, who wilfully does an act likely to occasion mischief, but also every one who produces such consequences by culpable carelessness and inattention, and want of due regard to the interests of others. Such principles apply themselves to the particular case of slander too forcibly to require any laboured application. When the law has once defined the right to character and reputation, it follows, as a legal conse-

quence, that any one who wilfully deprives another of the enjoyment of that right, offends against the law, and is bound to make reparation in damages co-extensive with the injury.

If such observations be well founded, it is clear that, if malice be used as descriptive of this species of injury, it must be understood not generally of actual malice, in the ordinary and popular sense of the term, or, as it has sometimes been called, *malice in fact*, but of malice in its legal and technical sense, as merely denoting that which is to be inferred from the doing of a wrongful act, without lawful justification or excuse (c).

That such *malice in law* is, in the absence of any legal justification or excuse, arising from collateral circumstances, sufficient to support the action for slander, seems now to be settled by the current of authorities.

Thus, in the case of the *King v. Lord Abingdon* (d), Lord Kenyon observed, that "In order to constitute a libel, the mind must be in fault, and show a malicious intention to defame; for if published inadvertently, it would not be a libel: but where a libellous publication is unexplained by any evidence, the jury should judge from the overt act; and where the publication contains a

(c) See Starkie on Evidence, title Malice—Intention.

(d) 1 Esp. C. 228.

charge, slanderous in its nature, they should from thence infer that the publication was malicious.’

In the case of the *King v. Phillips (e)*, Lord Ellenborough, observed, that “In case of libels, where the publication is proved, the law will infer malice.” In another case(*f*), the same learned judge observed, that “Every unauthorized publication, which is detrimental to another, is, in point of law, to be considered as malicious.”

In the case of the *King v. Creevy (g)*, Le Blanc, J. said, that “Where a publication is defamatory, the law infers malice, unless any thing can be drawn from the circumstances of the publication to rebut the inference.”

In the case of the *King v. Almon (h)*, the defendant, a bookseller, was convicted of publishing a libel, on proof of the sale of the book, containing the libel, by a servant of the defendant, in his shop. And it was said by the court, that this was *prima facie* evidence sufficient to ground a verdict upon; that if the defendant had had a sufficient excuse, he might have shown and proved it, and that any circumstances of exculpation or extenuation ought to have been established by the defendant.

(e) 6 East, 470.

(f) *Brown v. Croome*, Starkie’s, C. 297.

(g) 2 M. & S. 273.

(h) *R. v. Alman*, 5 Burr. 2686.

Abbott, L. C. J. in the case of the *King v. Harvey* (i), stated to the jury, that "The man who publishes slanderous matter, calculated to defame another, must be presumed to have intended to do that which his publication is calculated to bring about, unless he can show to the contrary, and it is for him to show the contrary."

A wanton disregard of the feelings of others, is, in point of law as well as morals, inexcusable; so that it is no defence for the publisher of a libel, to say that he was but in jest, for, as has been observed by a learned writer, the mischief to the party grieved is no way lessened by the merriment of him who makes so light of it (k). The mere absence of malice in particular against the party whose reputation is destroyed, and the excuse that the real motive was not malice, but a desire of gain, is no better plea than that which might be used by a hired assassin (l).

If, however, the inference of malice be a mere

(i) 2 B. and C. 258.

(k) 9 Co. 59. Moor, 627. Haw. c. 73. s. 14.

(l) Haw. P. C. c. 73. s. 14. It is scarcely necessary to observe here, that these observations do not apply where words, in themselves offensive, are used in jest, but without intention to convey any injurious imputation, and where the hearers do not understand the words in that sense; such cases fall under a very different consideration, for there is not, in effect, any publication of slanderous matter.

inference of law, it is capable of being rebutted; but not, it should seem, otherwise than by proof of such an occasion of publishing, as furnishes a legal excuse for the act.

In the abstract, to deprive another of his reputation, by any wilful or negligent act, is immoral and illegal; but the law, for wise purposes, and upon a principle of policy and convenience, restrains the right to damages, and affords a privilege and protection to many communications, though they deeply affect the characters of individuals: but as such a protection depends on considerations of legal policy, it is for the law to prescribe its limits and boundaries.

And the law does not, as it seems, extend that protection to any case, merely because an actual intention to injure is wanting, and unless some recognized justification or excuse be supplied by the occasion and circumstances attending the publication.

From some of the older authorities, indeed, it appears to be doubtful, whether, if the speaker or writer acted without malice, in the common and popular sense of the word, and intending, (it may be,) good, rather than harm, to another, he was civilly responsible for his act.

In the case of *Brooke v. Sir Henry Montague*(*m*),

(*m*) He cited 14 H. 7. 14. 20 H.6. 84.

Coke cited a case, where a clergyman, in a sermon, recited a case out of Fox's Martyrology, that one Greenwood, being a perjured person and a great persecutor, had great plagues inflicted on him, and was killed by the hand of God; whereas, in truth, he never was so plagued, and was himself present at that sermon. And he thereupon brought his action upon the case, for calling him a perjured person; and the defendant pleaded not guilty; and this matter being disclosed upon the evidence, Wray, C. J. delivered to the jury, that it being delivered but as a story, and not with any *malice* or *intention* to slander any, he was not guilty of the words maliciously, and so was found not guilty (n).

And Popham affirmed it to be good law, when he delivers matter after his *occasion* as matter of story, and not with intent to slander any.

This case, it is to be observed, is no authority for concluding that the mere absence of a slanderous intention may furnish a legal defence, independently of a lawful occasion of publishing; for there was in that case, as will be hereafter seen, a lawful *occasion* which, in the absence of actual malice, supplied a sufficient justification. For the story was delivered by a clergyman, in the course of discharging the duties of his sacred office.

(n) Cro. J. 90.

The plaintiff brought an action against one, for saying of him, that he heard he was hanged for stealing of an horse; and, upon the evidence, it appeared that the words were spoken in grief and sorrow for the news. Twisden, J. cited this, as a case which he heard tried before Hobart, J. who nonsuited the plaintiff, because the words were not spoken maliciously, and all the court agreed that this was done according to law (*o*).

It does not appear, from the short statement of this case, what were the particular circumstances of the case; yet it seems, in principle, that if any one, trusting to an idle rumour, occasions damage to another, either in law or in fact, he is, on the principles of natural justice, liable to render amends.

He is at least guilty of negligence, in giving publicity to an injurious and unfounded calumny.

The law, in the ample provision which it makes for the convenience and exigencies of society, necessarily regards the occasion and circumstances of publication, and does not afford indemnity from the consequences of publication of injurious and noxious matter, except with a view to some useful and beneficial purpose, where a party may be supposed to act honestly

and sincerely in the execution of some public or private duty. The gratification of curiosity, by the circulation of unauthenticated rumours, can scarcely be regarded as a fit object of legal protection. If so, it follows that every one who ventures to propagate an unfounded calumny, to the injury of the character of another, does it at his peril, and that, unless he can show some lawful occasion for publishing, that is, some cause for publishing under the particular circumstances which the law recognizes as affording a sufficient excuse, the total absence of an actual intention to injure will not avail as a justification.

It were almost needless to observe that, in numerous cases, the law gives an injured party a compensation in damages against the author of the mischief, although the latter was actuated by no mischievous intention. Thus, if a party, in the exercise of his lawful calling or business, casually injure the property or possession of another, he is liable to make compensation in damages, although he had no intention to injure any one.

So it is no justification or excuse to a man, that he published a libel, to the injury of another, merely in the course of his business and occupation of a printer, for he, as well as others, is



bound so to carry on his trade or business as not to injure others (*p*).

The late case of *Prosser v. Bromage* (*q*) affords an illustration of these principles ; and by this decision, the application of the distinction between malice in law and actual malice, or malice in fact, and the sufficiency of malice in law to support the action, seem to be fully established.

The plaintiffs were bankers, and the charge was, that, in answer to a question put by one Lewis Watkins, whether he, the defendant, had said that the plaintiffs' bank had stopped, the defendant's answer was, it was true he had been told so, that it was so reported at C., and that no one would take their bills, and that he had come to town in consequence himself. It was proved that C. D. had told the defendant, that there was a run on the plaintiffs' bank at M. Upon this evidence, it was left to the jury to say whether the defendant had acted maliciously and with ill-will towards the plaintiffs, and that they ought to find their verdict for the defendant, if they thought that he had not acted maliciously. After a verdict for the defendant, upon a motion for a new trial, the court (of King's Bench) held, that the law recognized the distinction between

(*p*) 2 St. Tr. 7. 547.

(*q*) 4 B. & C. 247.

these two descriptions of malice, viz. malice in fact and malice in law. That malice, in common acceptation, meant ill-will against a person; but in its *legal* sense, it meant a wrongful act done intentionally, without legal justification or excuse; and that, in ordinary actions for slander, malice in fact was not essential; that malice in law was sufficient, and was to be inferred from the publishing of the slanderous matter, the act being wrongful and intentional, and without any just cause or excuse (*r*).

(*r*) Bayley, J. delivered the judgment of the court, and after stating the circumstances of the case, observed. "The learned judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication; but as the defendant did not appear to be actuated by any ill-will against the plaintiffs, he told the jury, that if they thought the words were not spoken *maliciously*, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but if they thought them spoken *maliciously*, they should find for the plaintiff; and the jury having found for the defendant, the question, upon a motion for a new trial, was upon the propriety of this direction. If in an ordinary case of slander, (not a case of privileged communication,) want of malice is a *question of fact* for the consideration of a jury, the direction was right; but if in such a case, *the law implies* such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong. That malice, in some sense, is the gist of the action, and that,

So if the author of a libel, though he never intended to publish it, were so negligent to keep it, that through mere inadvertence, the con-

therefore, the manner and occasion of speaking the words is admissible in evidence; to show they were not spoken with malice, is said to have been agreed, (either by all the judges, or at least by the four, who thought the truth might be given in evidence on the general issue,) in *Smith v. Richardson* \*, and it is laid down, 1 Com. Dig. action upon the case for defamation, G. 5. that the declaration must show a malicious intent in the defendant; and there are some other very useful elementary books, in which it is said that malice is the gist of the action, but in what sense the word malice, or malicious intent, are here to be understood, whether in the popular sense or in the sense the law puts upon those expressions, none of these authorities state. Malice, in common acceptance, means ill-will to a person; but in its legal sense, it means a wrongful act done intentionally, without just cause or excuse. If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse; and if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not; and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions

\* Willes, 24.

tents became public, to the detriment of another's reputation, he would, no doubt, be considered amenable in damages. He had no right to place

of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*; it is not necessary to state that they were spoken *maliciously*. This is so laid down in *Styles*, 392. and was adjudged in error in *Mercer v. Sparks*. Owen, 51. Noy, 35. The objection there was, that the words were not charged to have been spoken maliciously; but the court answered, that the words were themselves malicious and slanderous, and therefore the judgment was affirmed. But in actions for such slander as is, *prima facie*, excusable, on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it or have a right to expect it, malice in fact must be proved by the plaintiff; and in *Edmonson v. Stevenson*, B. N. P. 8. Lord Mansfield takes the distinction between these and ordinary actions of slander. In *Weatherstone v. Hawkins*, 1 T. R. 110. where a master, who had given a servant a character, which prevented his being hired, gave his brother-in-law, who applied to him upon the subject, a detail, by letter, of certain instances, in which the servant had defrauded him. Wood, who argued for the plaintiff, insisted that this case did not differ from the case of common libels, that it had the two essential ingredients, slander and falsehood; that it was not necessary to prove express malice, if the matter is slanderous, malice is implied; it is sufficient prove publication, the motives of the party publishing are never gone into; and that the same doctrine held in actions for words, no express malice need be proved. Lord Mansfield said the general rules are laid down as Mr. Wood has stated; but to every libel there may be an implied justifi-

the character of another in jeopardy without lawful excuse, and, in law as well as morals, is responsible for the injury which his culpable neg-

cation from the occasion. So as to the words, instead of the plaintiff's showing it to be false and malicious, it appears to be incidental to the application by the intended master for the character; and Buller, J. said this is an exception to the general rule, on account of the occasion of writing. In actions of this kind, the plaintiff must prove the words "*malicious*" as well as *false*. Buller, J. repeats in *Pasley v. Freeman*, 3 T. R. 51. that for words spoken confidentially upon advice asked, no action lies, unless express malice can be proved. So in *Hargrave v. Le Breton*, 4 Burr. 2425. Lord Mansfield states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary circumstances of express malice. But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential; nor is there any instance of a verdict for the defendant on the ground of want of malice. Numberless occasions must have occurred, (particularly where a defendant only repeated what he had heard before, but without naming the author,) upon which, if that were a tenable ground, verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them, as a previous question, whether the defendant understood Watkins as asking for information for his own guidance, and that the defendant spoke what he did to Watkins merely by way of honest advice, to regulate his conduct, the question of malice in fact would have been proper as a *second* question to the jury, if their minds were in favour of the defendant upon the first;

ligence has occasioned. The legal principle on which such responsibility is founded, is clearly delivered in Buller's Law of Nisi Prius.

Every man ought to take care that he does not injure his neighbour; and, therefore, whenever a man receives a hurt through the *default* of ano-

but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are of opinion that the question of malice ought not to have been left to the jury. It was, however, pressed upon us with considerable force, that we ought not to grant a new trial, on the ground that the evidence did not support any of the counts in the declaration; but upon carefully attending to the declaration and the evidence, we think we are not warranted in saying, that there was no evidence to go to the jury to support the declaration, and had the learned judge intimated an opinion that there was no such evidence, the plaintiff might have attempted to supply the defect. We, therefore, think that we cannot properly refuse a new trial, upon the ground that the result upon the trial might have been doubtful. In granting a new trial, however, the court does not mean to say, that it may not be proper to put the question of malice as a question of fact for the consideration of the jury; for if the jury should think, that when Watkins asked his question, the defendant understood it as asked in order to obtain information to regulate his own conduct, it will range under the class of privileged communication, and the question of malice, in fact, will then be a necessary part of the jury's inquiry: but it does not appear that it was left to the jury, in this case, to consider whether this was understood, by the defendant, as an application to him for advice, and if not, the question of malice

ther, though the same were not wilful, yet if it be occasioned by *negligence or folly*, the law gives him an action to recover damages for the injury so sustained (*q*).

This principle comprehends not only the instance just mentioned, where a writing not intended to be published is, nevertheless, divulged for want of care, but every case in which a noxious publication results from mere levity or thoughtless jocularity; for though the actual intention to produce mischief might not at the moment actually influence the mind of the defendant, yet he was guilty of a wilful invasion of the natural and absolute right of another man,—an act for which, in point of natural justice, he is responsible, and from which, malice, in its legal sense, is necessarily to be inferred.

The plea of minority affords no defence to an

was improperly left to their consideration. We are, therefore, of opinion, that the rule for a new trial must be absolute.

In the case of *Duncan v. Thwaites*, 3 B. & C. 585. Abbott, L. C. J. observed, “I take it to be a general rule, that an act, unlawful in itself and injurious to another, is considered, both in law and reason, to be done *maliciously* toward the person injured, and this is all that is meant in a declaration of this sort, which is introduced rather to exclude the supposition that the publication had been made on some innocent occasion, than for any other purpose.

(*q*) B. N. P. 95.

action for slander or libel, for though a precedent is to be found of a plea that the defendant was an infant, within the age of seventeen (r), the validity of such a plea was denied by Lawrence, J. in the case of *Woolnoth v. Meadows* (s). And Lord Kenyon expressly stated, that if an infant utter slander, he is responsible for it in a court of justice (t).

But though actual malice be not essential to civil liability, and though it be sufficient that the defendant has acted wilfully, or even negligently and carelessly, without a due regard to the character and reputation of another, yet still the mere act of communicating that which is slanderous, will not subject a party even to civil liability, without some degree of culpability on his part. If, for instance, a servant or agent were, in the ordinary course of his duty, to deliver a sealed libel, without any knowledge of its contents, though he were thus the actual instrument of publication, yet if he acted but as the agent of another, without any reason for suspecting that any wrong was intended, he would not subject

(r) 5 East, 471.

(s) Com. Dig. Pleader, 2 L. 2.

(t) 8 T. R. 337. See also Bac. Ab. tit. Infancy. Starkie on evidence, tit. Infant.



himself to any civil, still less to any criminal, responsibility.

This application of a plain and general principle of natural justice, is too obvious to require further observation in this place.

## CHAPTER IX.

*Justification.—Truth.*

HAVING thus observed upon the question of intention, as considered independently of the occasion of publishing and of all collateral circumstances, the subject is next to be considered in reference to the occasion and circumstances of the act.

These may either constitute an absolute and peremptory defence to the action, independently of the question of intention, or they may supply a qualified or conditional justification, dependent on the actual intention of the party.

The former class, where the defence is wholly independent of the question of actual intention, is subject also to a distinction, dependent on the existence or non-existence of a probable cause for the act.

In the first place, the defendant is justified in law, and exempt from all civil responsibility, if that which he publishes be true (*a*). For, as has

(*a*) It may, perhaps, be doubted, (as has already been suggested, *supra*, p. 7,) whether it might not be more correct to consider the *falsity* of the slander as of the essence of the

already been observed, no one, in point of natural justice and equity, can have any title to a false character; he can show no legal interest in the suppression of truth, or in the continuance of error; it would be inconsistent with every sound legal principle and analogy, to allow him to recover damages for an injury to that which he either does not, or at least ought not, to possess; and it would be contrary to the plainest and most obvious principles of public policy and convenience, to permit a man to make gain of the loss of that reputation and character in society, which he had justly forfeited by his misconduct (*b*).

Sir William Blackstone (*c*), in his Commenta-

wrong, than to treat the truth as a collateral ground of defence; and some reasons, principally technical, have been assigned for adopting the latter course. *Supra*, p. 5, in the note.

(*b*) See Preliminary Discourse. By showing the truth of the slanderous matter, you do not show that it was not maliciously spoken or published, but merely that the party is not entitled to damages, because he is guilty of the charge imputed. Per Holroyd, J. in the case of *Fairman v. Ives*, 5 B. & A. 646.

On similar grounds of public policy, it has been held, that a man cannot recover damages for any defamation which affects him merely in respect of some illegal trade or occupation. Thus, it seems, that an action cannot be maintained for an alleged libel against the plaintiff, in his vocation as an exhibitor of sparring matches. *Hunt v. Bell*, 1 Bing. 1.

(*c*) 3 Bl. Com. 125. But although the doctrine of the

ries, seems to consider the defendant's exemption, in this instance, as extended to him in consideration of his merit, in having warned the public against the evil practices of a delinquent. He says, that it is *damnum absque injuriâ*, intimating that the act of the defendant does not constitute a *wrong* in its legal sense; and then proceeds to observe, that this is agreeable to the reasoning of the civil law, "*Eum qui nocentem infamavit non est æquum et bonum ob eam rem condemnari, peccata enim nocentium cognita esse et oportere et expedire.*" Notwithstanding this, there seems to be some difficulty in supporting this justification, on the ground that the defendant's act is not, in contemplation of law, a *wrong*, since, as will be seen, it is considered as such in the criminal proceeding, and if the act be justifiable, because it confers a public benefit, it must be so to all legal purposes; for it would savour too much of paradox to say, that in respect of an individual claiming a private compensation, the act is innocent, because it is beneficial to the public, but that, in relation to the public so benefited, the same act is wrongful. It may, therefore, be more consistent to consider the

civil law, in respect of such actions, is by no means free from obscurity, the defence seems clearly to have been limited to those instances where the public was benefited by a publication of the truth. See Preliminary Discourse, xxxix.

plaintiff as having excluded himself from the protection of the law by his own misconduct, than to attribute the exemption to any merit appertaining to his adversary.

When a plaintiff is really guilty of the offence imputed, he does not offer himself to the court as a blameless party seeking a remedy for a malicious mischief, his original misbehaviour taints the whole transaction with which it is connected, and precludes him from recovering that compensation to which an innocent person would be entitled (c).

That the truth was a good justification, does not appear to have been doubted in the case of words spoken; in respect of an action for libel, indeed, the contrary has been maintained; but the authorities upon this point, though not numerous, fully establish the validity of such a justification.

In the case of the *King v. Roberts* (d), Lord Hardwicke, C. J. is said to have thus expressed himself on a motion for an information against the defendant: "It is said, that if an action were brought, the fact, if true, might be justified; but I think that is a mistake, such a thing was never thought of in the case of *Harman v. Delany* (e.) I

(c) See Preliminary Discourse, xxxv.

(d) B. R. M. and G. 2. MSS. 3 Bac. Ab. 455. Dig. Law Lib. 16. Sel. Ni. Pri. 1st Edit. 929.

(e) Str. 898.

never heard such a justification in an action for a libel even hinted at, the law is too careful in discountenancing such practices; all the favour that I know truth affords in such a case is, that it may be shewn in mitigation of damages; and of the fine in an indictment or information."

And in another case, it was said by Lee, C. J. (*f*) (upon the trial of the defendant upon an information), that it had always been holden that the truth of a libel could not be given in evidence by way of justification; because, where the person charged with any crime is guilty, he ought to be proceeded against in a legal course, and not reflected upon in such a manner. In the *King v. Bickerton* (*g*), the Chief Justice (*h*) observed, (upon a motion for a criminal information), that though truth be no justification for a libel, as it is for defamatory words, yet it would be sufficient cause to prevent the extraordinary interposition of the court.

In the last two cases, the dicta of the learned Judges cannot but be understood as spoken with reference to the criminal proceeding before them, and therefore as no authorities in respect of an action.—On the other hand, Hobart, C. J. in the case of *Lake v. Hatton* (*i*), said, that a libel, though

(*f*) Sel. Ni. Pri. 1st Ed. 929.

(*g*) Str. 498.

(*h*) Sir J. Pratt.

(*i*) Hob. Rep. 253.

the contents be true, may be justified in an action upon the case.

And Holt, C. J. laid it down expressly, that "A man (*k*) may justify in an action for words or for a *libel*, otherwise in an indictment."

In the case of *J. Anson v. Stuart* (*l*), the truth was pleaded in bar of the action for written slander, and no objection was made, or exception taken, either by the court or the plaintiff's counsel, to the defendant's right to avail himself of a defence of that nature.

Sir William Blackstone seems to have been of opinion, that the truth was a good justification in case of an action for libel; since, after asserting that it is a good defence in case of slander spoken (*m*), he adds, "What was said with regard to words spoken, will also hold in every particular with regard to libels by printing or writing, and the civil actions consequent thereupon (*n*)."

With respect to an action for *Scandalum Mag-natum*, it was resolved in the *Earl of Northampton's case* (*o*), that "the publishing of false rumours, either concerning the king or of the high

(*k*) 11 Mod. 99.

(*l*) 1 T. R. 748.

(*m*) 3 Bl. Com. 125.

(*n*) See also 3 Wood. 182; 3 Bl. Com. 125, 14th Ed.; and Selwyn's *Ni. Pri.* 1st ed. 929.

(*o*) 12 Rep. 133.

grandeess of the realm, was in some cases punishable by the Common Law; but of this were divers opinions. Yet it was resolved in general, that touching the matter and quality of the words, that they ought to be *false* and horrible."

North, C. J. (*p*) was of opinion, that under the statute, the defendant could not justify in an action for scandalum magnatum. But both Atkins and Scroggs, justices, thought differently; and the latter held, that the words in the principal case might have been justified by shewing the special matter either in pleading or evidence.

And in Lord Cromwell's case (*q*), the defence in such an action seems to have been considered on the same footing with a common action for slander. The general rule, therefore, seems to be, that in action for words, their truth is a good justification.

The plaintiff was charged as accessory to a felony, the principal having been acquitted; and it was held to be competent for the defendant to go into evidence to prove his guilt, because what had passed between others could not affect him (*r*).

Where (*s*) the words imputed a charge of murder, for which the plaintiff had been tried and ac-

(*p*) 2 Mod. 150.

(*q*) 4 Co. 13.

(*r*) *Cook v. Field*, 3 Esp. C. 133.

(*s*) *England v. Bourke*, 3 Esp. C. 80.



quitted, it was held that the defendant might justify specially, and that the truth of such plea might be tried. And it has been said, that where the defendant justifies specially, by pleading the truth of a capital offence imputed to the plaintiff (*t*), on such issue being found against the plaintiff, he may be put upon his trial for the offence without the intervention of a grand jury.

The justification must be pleaded, and proved with great precision. Thus, if the defendant tax the plaintiff with having feloniously stolen a sum of money, it will be no justification that the plaintiff had in fact (*u*) stolen some other personal chattel.

(*t*) 3 Esp. R. 133. *Cook v. Field*. Many remarkable cases have occurred, where the plaintiff's action for slander imputing the commission of a crime, has occasioned his prosecution for and conviction of the imputed offence. In the case of *Johnson v. Browning*, 6 Mod. 217. Ld. Holt, C. J. cited a case (Pigot's case. Cro. Car. 383.) where a mother recovered damages against her son-in-law, for having maliciously prosecuted her for the murder of his father. He, to requite her kindness, brought an appeal of murder, she was thereupon tried and convicted at the King's Bench Bar, and carried down and burnt in Berksire.

And the Chief Justice mentioned the case of a plaintiff who brought his action, the defendant having called him a highwayman; upon the trial it appeared that he was one; he was taken in court, committed to Newgate and hanged.

And Darnell (adds the reporter) remembered the like fate, which befel a *client* of his.

(*u*) Cro. J. 676.

So, where the defendant (x) said of a counsellor at law, "You are a paltry lawyer, and use to play on both hands." The defendant justified as to the latter words, that the plaintiff had devised certain articles against F. R. concerning misdemeanors supposed to have been done by him, and afterwards promised F. R. that he should not be molested by reason of the said articles; and yet, notwithstanding, by the procurement of others, the plaintiff endeavoured to prosecute F. R. upon the said articles, before the chancellor and commissioners of the Archbishop of Canterbury;" and the plea was held to be bad on demurrer.

No suspicion, however strong, will amount to a justification (y).

Neither is common fame any ground for justifying an extra-judicial charge (z).

In *Cuddington v. Wilkins* (a), which was an action for publishing these words of the plaintiff, "He is a thief;" the defendant pleaded, that the plaintiff had been guilty of stealing six sheep. The plaintiff replied, that after the felony, and before the publication of the words, he had been pardoned by a general pardon. Upon a demurrer,

(x) Cro. J. 267.

(y) *Powell v. Plunkett*, Cro. Car. 52.

(z) Hutt. 13. Bridg. 62. Brownlow, 2.

(a) Hob. 81.

this replication was holden to be good, inasmuch as the guilt, as well as the punishment, is taken away by a pardon. And it was held, that it makes no difference in such case, whether the pardon be general or special, of which the defendant might have been ignorant, for that every person who publishes slanderous words does it at his peril.

But it was said, that if he had been convicted and pardoned afterwards, it would be otherwise.

But (*b*) a pardon after a conviction of perjury will not restore the perjured person to his credit.

It has long been settled (*c*), that the truth, if relied upon as a justification, or even in mitigation of damages, must be pleaded. And as the degree of certainty and precision necessary to complete a justification of this nature is inseparably connected with the form and rules of pleading, further remarks upon this topic will be reserved for the division in which the technical mode of framing the plea is considered.

(*b*) Sid. 92.

(*c*) Str. 1200.

## CHAPTER X.

*Of Publications made in the Course of Parliamentary or Judicial Proceedings.*

THE law, also, without regard to the question of intention, and on grounds of obvious policy (*a*), repels the claim to damages in respect of any publication duly made in the ordinary course of a parliamentary or judicial proceeding.

In the first place (*b*), it seems that no member of either house is in any shape responsible in a court of justice for any thing said in that house, however offensive the matter may be to the feelings, or detrimental to the interest of any individual (*c*); for policy requires that those who are by the constitution appointed to provide for the safety and welfare of the public, should, in the execution of their high functions, be wholly uninfluenced

(*a*) See Preliminary Discourse.

(*b*) 1 Esp. R. 226.

(*c*) By 4 Hen. 8. c. 8. members of parliament are protected from all charges against them for any thing said in either house.

And this is further declared in the Bill of Rights. 1 W. M. st. 2. c. 2. See 1 Bl. C. 164.

by private considerations. Accordingly, in such cases, (as has been asserted by a high authority (*d*)), courts of law possess no jurisdiction. But the privilege does not extend beyond the walls of the house to which the member belongs; and a peer, who publishes (*e*) libellous matter in the public prints, as having constituted part of his speech in parliament, is as open to an action or prosecution as any private individual.

The same rule, as to impunity, suggested and governed by similar principles, applies to judges, juries, and witnesses, in respect of any thing published by them in the course of a judicial proceeding.

Certain charges (*f*) having been preferred by the plaintiff against an officer of his own regiment, the court martial, after acquittal, subjoined the following declaration :

“ The court cannot pass, without observation, the malicious and groundless accusations that have been produced by Captain J. against an officer whose character has during a long period of service, been so irreproachable as Colonel Stewart's; and the court do unanimously declare, that the

(*d*) Lord Kenyon, in the *King v. Lord Abingdon*. 1 Esp. Rep. 226.

(*e*) *R. v. Lord Abingdon*, 1 Esp. R. 226. *R. v. Creery*, 1 M. & S. 273.

(*f*) 2 N. R. 341.

conduct of Captain J. in endeavouring falsely to calumniate the character of his commanding officer, is most highly injurious to the good of the service." For this the plaintiff brought his action against Sir J. Moore, the president of the court martial. Upon the trial of the cause before Sir J. Mansfield, C. J. it appeared, that the supposed libel formed part of the opinion of the court, delivered by the defendant to the Judge Advocate, for the purpose of being submitted to the king, and immediately followed the declaration of the opinion of the court martial;—"that he, the aforesaid Colonel Richard Stewart, is not guilty of either of the charges, and the court do most fully and honourably acquit him." The plaintiff was nonsuited.

And afterwards a new trial was refused, on the ground that the words complained of formed part of the judgment of acquittal.

So it is held, that no presentment (*g*) by a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do; but also, because it would be of the utmost ill consequence in any way to discourage

(*g*) Bac. Ab. tit. Libel. 455. Mo. 627. Haw. P. C. c. 73. s. 8. See also the observations of the court in *Johnson v. Sutton*, 1 T. R. 493.

them from making their inquiries with that freedom and readiness which the public good requires.

Several of the authorities in the books cited relate to cases of criminal prosecution, but the reasons and principles are equally forcible, when applied to a civil action, the same policy in both cases opposes itself to the calling in question the motives of the parties.

Witnesses, like jurors, appear in court (*h*) in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty; and though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible in a civil action for any reflections thrown out in delivering their testimony.

The plaintiff brought an action (*i*) against one L., and the defendant being produced as a witness at the trial, gave evidence that the plaintiff was a common liar, and so recorded in the Star-Chamber; by reason whereof the jury gave the plaintiff small damages. After verdict for the

(*h*) See 2 Inst. 228. 2 Rolls Rep. 198. Pal. 144. 1 Vin. A. 387. Cro. Eliz. 230.

(*i*) Brownlow 2. *Harding v. Bulman*. Hast. 11.

plaintiff for this alleged slander, it was moved in arrest of judgment, that the action did not lie; for if it did, every witness might be charged upon such a suggestion, and judgment was given for the defendant (*k*).

X With respect to petitioners in parliament (*l*), and suitors or prosecutors in courts of law, it has been held, that no proceeding, according to the regular course of justice, will make the complaint amount to a libel, so as to render the party criminally liable, on the ground that it would be a great discouragement to suitors to subject them to public prosecutions in respect of their applications to a court of justice; and that the chief intention of the law, in prohibiting persons to revenge themselves by libels or any other private manner, is, to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the law has appointed to determine them (*m*).

(*k*) It has been doubted, (not much to the credit of the law), whether a preconcerted scheme for taking away the life of another by false evidence, for the sake of obtaining a statutable reward upon conviction, amounts, when carried into effect, to the crime of murder.—See Leach's C. C. L. 52. Foster, 130, 131.

(*l*) See the resolution of the House of Commons in the case *Kemp v. Gee*, 9 Feb. 8. W. 3.

(*m*) Dyer, 285. 2 Ins. 228. 2 Buls. 269. Godb. 840. Pal.



for a libel, supposed to be contained in a petition presented to the house for a redress of grievances, and that all petitions to them were lawful, or at least punishable by themselves only.

So, no action lies for any allegation, pleading, or other matter (*r*), published in the usual course of a civil or criminal proceeding in courts of justice. The reason for which is, that (*s*) if actions should be permitted in such cases, those who have just cause of complaint would not dare to complain, for fear of infinite vexation. And, as was observed by Lord Mansfield, C. J. (*t*) there can be no scandal if the allegation be material; and if it be not, the court before whom the indignity is committed, by immaterial scandal, may order satisfaction, and expunge it out of the record, if it be upon the record.

Thus where (*u*) the plaintiff declared that the de-

(*r*) 1 Roll. 33.

(*s*) 4 Coke, 14.

(*t*) 2 Burr. 817.

(*u*) *Astley v. Young*, 2 Burr. 817. So where in an action on the case by A. against B., the plaintiff declared that he took his oath in B. R. against B. of certain matters, to bind him to his good behaviour; and thereupon B. said falsely and maliciously, and intending to scandalize the plaintiff, "There is not a word true in that affidavit, and I will prove it by forty witnesses." On motion in arrest of judgment, the jury having by their verdict found the words to be false and malicious, it was holden by the court, that the action was not maintainable,

fendant, in a certain affidavit before the court, had sworn that the plaintiff in a former affidavit had sworn falsely ; the court held that this was not actionable, for that in every dispute in a court of justice, where one, by affidavit, charges a thing which the other denies, the charges must be contradictory, and there must be affirmation of falsehood ; and this being necessary in a legal proceeding, no action would lie for it.

So in trespass (*x*), if the defendant, in his plea of justification, falsely aver that the plaintiff was a bankrupt, and that the defendant had a commission upon the statute, by virtue of which those goods were delivered to him ; yet the plaintiff, for the words, cannot maintain an action.

In *Weston v. Dobniet* (*y*), the plaintiff declared, that there was a suit in the spiritual court between one A. and the defendant, wherein A. produced the now plaintiff as a witness ; that the defendant, having a day given to except against the witnesses, put in his exceptions in writing, alleging, that the now plaintiff was not a competent witness, and

because “ the answer which B. made to the affidavit was a justification in law, and spoken in defence of himself, and in a legal and judicial way.”—Roll. Ab. 87. pl. 4. Sir W. Jones, 431. Mar. 20. pl. 45. Cited by Mr. J. Holroyd in *Hodgson v. Scarlett*, 1 B. and A. 244.

(*x*) Cro. J. 432.

(*y*) 3 Bl. Com. 126. 10 Mod. 210. 219. 300. Str. 691.

that there ought not any credit to be given unto him, because he was perjured. Whereupon the plaintiff (pending the suit) brought the action for this scandal ; but the whole court held that the action was not maintainable, because the proceeding was in the common course of justice, and not *ex malitiâ*.

And in criminal prosecutions, it seems to be perfectly well established, that no action will lie for any distinct matter disclosed in the course of such a proceeding, but that the party must seek his remedy for a malicious and groundless prosecution, either by writ of conspiracy or by a special action on the case, founded upon the whole of the circumstances (z).

Sir Richard Buckley (a) brought an action against Owen Wood, for exhibiting a bill against him in the Star Chamber, and charging him with several matters examinable in that court ; and charging him further, that he was a maintainer of pirates and murderers, and a procurer of pirates and murderers, which offences were not determinable in the Star Chamber.

And it was resolved by the whole court, that for any matter that was contained in the bill that was examinable in the said court, no action lies, al-

(z) 3 Bl. Com. 126, 10 Mod. 210, 219. 300. Str. 691.

(a) 4 Co. 14.

though the matter be merely false, because it was in the course of justice; and that this agreed with the judgment before given in *Cutler v. Dixon* (b). But it was also resolved, that for the words not examinable in the Star Chamber, an action on the case lies, for that cannot be in a course of justice; and that if such matter might be inserted in bills in so high a court to the great slander of the parties, and they cannot answer it to clear themselves, nor have their action as well to clear themselves, as to recover damages for the great injury and wrong done them, great inconvenience would ensue.

That by law, no murder or piracy could be tried by bill, but by indictment only; and therefore, that the defendant had not only mistaken the proper court, but the manner and nature of the bill had not any appearance of a suit in the ordinary course of justice.

But that if a man brought an appeal of murder returnable in the common pleas, no action would lie: for, though the writ was not returnable before competent judges, yet it is in the nature of a lawful suit, namely, by writ of appeal."

The first part (c) of this resolution has been frequently confirmed, and extends to all proceedings

(b) *Dyer*, 285.

(c) 2 Inst. 228. Roll. Ab. 87. pl. 4. Sir W. Jon. 431.

in the regular course of justice, and to actions for scandalum magnatum (*d*).

The defendant (*e*) brought a writ of forger of false deeds against Lord Beauchamp: and, pending the writ, Lord B. brought an action for the scandal. The defendant justified by his having the said writ before. Upon demurrer, the justification was holden to be good, and out of the intendment of the law and statutes of slander.

And if the publication be made in the course of a judicial proceeding, it does not appear to be essential to the justification that the defendant strictly observed the technical mode of proceeding.

The plaintiff declared, that he made an affidavit to have the defendant bound over to his good behaviour: and that the defendant, in the hearing of the justices and officers (*f*) of the court and others present, said, "There is not a word of truth in that affidavit, and I will prove it by forty witnesses." And it was held that the words were justifiable, being in a judicial way.

And the same rule obtains where application is made in the usual course to a magistrate or other peace officer.

The defendant went to a justice (*g*) of the peace

(*d*) 2 Buls. 269. 2 Burr. 808. 3 Bac. Ab. 492.

(*e*) *Lord Beauchamp v. Sir R. Croft*, Dyer, 285.

(*f*) Jo. 341. Mar. 20. *Boulton v. Clapham*.

(*g*) Hutt. 113. *Ram v. Lamley*.

for a warrant against the plaintiff, for stealing his ropes. The justice said, "Be advised, and look what you do:" and the defendant replied, "I will charge him with flat felony, for stealing my ropes from my shop."

The court agreed, that these words being spoken to a justice of the peace, when he came for his warrant, which was lawful, would not maintain an action, for if they could, no other would come to a justice of the peace to inform him of a felony. But where the question arose, whether the clerk to a magistrate could be called on as a witness, to state whether he had not, by the defendant's orders, written an extra-judicial affidavit (which was charged in the declaration to be a libel), and delivered it to the magistrate, Wood, B. ruled, that the question tended to criminate the witness, though he acted merely as a clerk (*h*).

(*h*) *Maloney v. Bartley*, 3 Camp. 210. The learned Baron observed, "I think the questions proposed tend to criminate the witness. The affidavit which he is supposed to have copied and delivered to the magistrate is alleged by the plaintiff to be libellous, and it was extra-judicial; therefore, all concerned in writing and publishing it are in point of law guilty of a misdemeanor. Had the affidavit been made in the course of a judicial proceeding, no indictment nor action could have been maintained against the clerk, whatever might have been the nature of its contents. But the affidavit being voluntary and extra-judicial, I cannot take notice that the person, before whom it is pretended to be sworn, was a magistrate, or allow

By the latter resolution, in the case of *Buckley v. Wood* (i), the court decided that scandalous matter *would be actionable*, if exhibited by means of an improper process, *and* in a court which had no jurisdiction over the subject matter; but it plainly appears that the court held, that both impropriety of process and want of jurisdiction must concur to deprive the defendant of his justification; for it was expressly said, that the bringing a writ of appeal of murder in the Common Pleas would not be actionable; since, though they wanted jurisdiction in the particular instance, yet that the proceeding by writ of appeal was in the nature of a lawful suit.

any privilege to those who were employed in framing it. The witness is in the common situation of a person who has, without authority, written a copy of a libel and delivered it to a third person. If his master, or if the magistrate, had ordered him to do so, this would have been no justification. It has been held, that the mere delivery of a libel to a third person, by one conscious of its contents, amounts to a publication, and is an indictable offence. I take the question to be, whether the witness was not concerned in writing the affidavit, and delivering it to the magistrate, and this I am of opinion he is not bound to answer. So in the case of *M<sup>c</sup>Gregor v. Thwaites*, 3 B. & C. 24, it was held to be no answer to the action, that the matter published by the defendants was a correct report of what actually took place in the presence of a magistrate, inasmuch as it appeared that he was not then called on to act, either in a judicial or magisterial capacity.

(i) 4 Co. 14.

In *Lake v. King* (*k*), the court said, that notwithstanding what was reported in Buckley's case, it was held that want of jurisdiction will not make a libel, for it is only the error of counsel.

Powel, J. (*l*) is reported to have said, "I have heard my Lord Hale say, that for putting matters in a bill, of which the court hath no cognizance, action does not lie against the plaintiff," though in the fourth report it is laid down otherwise.

Serjeant Hawkins (*m*), in his Pleas of the Crown, observes, "It has been holden by some, that no want of jurisdiction of the court, to which such a complaint is exhibited, will make it a libel, because the mistake of the court is not imputable to the party, but to his counsel, Yet, if it shall manifestly appear, from the whole circumstances of the case, that a prosecution is entirely false, malicious, and groundless, and commenced not with a design to go through with it, but to expose the defendant's character under a shew of legal proceeding, I cannot see any reason why such a mockery of public justice should not rather aggravate the offence than make it cease to be one, and make such scandal a good ground of indictment at the suit of the king, as it makes the malice of the pro-

(*k*) 1 Vin. Ab. 389. note to pl. 67.

(*l*) 2 Lut. 1571.

(*m*) Pl. Cr. 73. s. 8. See also Serj. Williams's note, 1 Saund. 132.



ceeding a good foundation of an action on the case, at the suit of the party, whether the court had jurisdiction or not.”

From these authorities it may be collected generally, that *an action of slander cannot be maintained for any thing said, or otherwise published either by a judge, a party (n), or a witness, in the due course of a judicial proceeding, whether criminal or civil*, though for a malicious and groundless prosecution, an action, and perhaps an indictment, may be supported, founded on the whole proceeding (o).

It must, however, be recollected, that the justification does not extend to any publishing which the usual course of judicial proceeding does not warrant. Thus, in *Lake v. King*, the great doubt was, not whether the exhibiting the petition to parliament was lawful or not, but whether the defendant was warranted in printing and publishing it in the manner alleged (p) in his plea.

And so, in the case of *Hare v. Meller* (q), it was adjudged to be lawful to present a petition to the queen, though reflecting upon the character of the plaintiff; but deemed to be actionable afterwards

(n) As to the case of an advocate, vide *infra*.

(o) Vide *infra*.

(p) 1 Saund. 132.

(q) 3 Lev. 169. See also 4 Rep. 14. See also *R. v. Creevy*, 1 M. & S. 273, and the ensuing chapter.

invulge the contents to the disgrace of the  
on intended. X

and though it be matter of public policy, that  
cases for the exercise of authority in the dis-  
of an officer should be made known,  
it seems that such a publication must be  
according to the nature of the official duty  
of the defendant.

thus in the case of *Oliver v. Bentinck* (u), al-  
though it was held that the defendant, being  
Governor in Council of Fort St. George, would  
be justified in publishing, according to the fact,  
that the Court of Directors had resolved to dis-  
miss the plaintiff from the service for a gross viola-  
tion of the trust reposed in him as commanding  
officer of the Molucca Islands, and that he the de-  
fendant had been ordered to erase his name from  
the army list, yet it was held, that it was essential  
to the defendant's plea to show on what account  
it was part of his duty to publish the alleged  
libel (x).

(u) 3 Taunt. 456.

(x) And for want of shewing this, the plea was held to be  
defective, but leave was given to amend.

Mansfield, C. J. observed, that it was better for the company,  
for the country, and for the *plaintiff himself* (according to the  
report,) that the cause of his dismissal should be stated, than  
that it should be supposed that the East India Company did it  
*suo arbitrio*.

Heath, J. observed, that it was the constant practice here,

Where, however, a party claims title to an estate, to the injury of the real owner, though he does it extra-judicially, yet is he not liable in an ordinary action for slander of title, but must recover, if at all, by means of a special action on the case, shewing that there was no colour or probable cause for the claim (y).

that when a delinquent has been brought to a court-martial, the commander in chief has directed the sentence to be read at the head of every regiment.

Lawrence, J. said, "I suppose the plaintiff's object was to lay before a jury the circumstances of this gentleman's conduct, by a question to be raised on this record; that could never be permitted in this form; but the plea is certainly defective, for the order is issued to the governor in council; and it is not shown that what the defendant did he did as governor in council, he only pleads that he did it as governor, and does not show how it became his duty to do this in his individual capacity as governor.

Chambre, J. "The only doubt I have is, that the plea does not state on what account it became an act in the execution of the defendant's duty to publish this. Can we suppose that he had a right to publish it in hand-bills and newspapers? The only authority he shows is for erasing the name from the army list, not for the publication.

(y) *Sir G. Gerard v. Dickenson*, 4 Co. 28. *Goulding v. Herring*, *infra*. 290.

## CHAPTER XI.

*Parliamentary and Judicial Reports.*

UPON the question, how far the reporting of parliamentary proceedings can be deemed libellous, some difference of opinion has prevailed.

Upon an information against the defendant, for publishing (a) "*Dangerfield's Narrative*," he pleaded that he was, at the time of the publication, Speaker of the House of Commons, and, as such, had a right to publish the votes and acts of the house, and that the narrative was printed and published as parcel of the proceedings ; and notwithstanding this, the court gave judgment for the king (b).

But in the *King v. Wright* (c), an application was made to the Court of King's Bench to grant a criminal information against the defendant for printing and publishing a libel on an individual. Upon

(a) *R. v. Williams*. 2 Show. R. 471. Comb. 18. See Sir R. Atkyns on the Power of Parliament.

(b) This case was reprobated by Lord Kenyon, C. J. and Grose, J. giving judgment in the *King v. Wright*, 8 T. R. 293.

(c) 8 T. R. 293.

the defendant's affidavit, it appeared that the charge complained of was a paragraph contained in the report of the Committee of Secrecy of the House of Commons, a literal copy of which he had published.

After hearing counsel on the part of the applicant, the information was refused, Lord Kenyon, C. J. observing, "As this was a true copy of the report of the House of Commons, I think there was not the least pretence for the motion; the application supposes that the publication is a libel, but it is impossible to admit that the proceeding of either of the houses of parliament is a libel.

"The case of Sir W. Williams, which was principally relied on, happened in the worst of times, but that has no relation to the present case. There the publication was the paper of a private individual, and under pretence of the sanction of the House of Commons, an individual published; but this is a proceeding by one branch of the legislature, and therefore we cannot inquire into it."

Grose, J. said, "On looking into the judicial proceedings of this court, I find no instance of such an information as the present; the case of Sir W. Williams is most like this, but it must be remembered, that that was declared by a great authority to be a disgrace to the country.

Lawrence, J. observed, "It has been said, that

the publication of the proceedings in courts of justice, when reflecting on the character of an individual, is a libel; to support which position, the case of *Waterfield v. the Bishop of Chichester* has been cited (*d*); but, on examining that case, it appears that the charge there was, that the plaintiff had not published *a true account*. The proceedings of courts of justice are daily published, some of which highly reflect on individuals, but I do not know that an information was ever granted against the publisher of them. Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the courts, but they are printed for the information of the public. Not many years ago, an action was brought in the Court of Common Pleas by Mr. Curry (*e*), against Walter, the proprietor of the Times, for publishing a libel in the paper of "The Times;" which supposed libel consisted in merely stating a speech made by a counsel in this court, on a motion for leave to file a criminal information against Mr. Curry. L. C. J. Eyre, who tried the cause, ruled that this was not a libel, nor the subject of an action, it being a true account of what had passed in this court; and in this opinion the Court of Common Pleas afterwards, on a motion for a new trial, all concurred, though some of the

(*d*) 2 Mod. 118.

(*e*) 1 B. & P. 525.

judges doubted whether or not the defendant could avail himself of that defence on the general issue : though the publication of such proceedings may be to the disadvantage of the individual, the having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. The same reasons, also, apply to the proceedings in parliament ; it is of advantage to the public and even to the legislature besides, that true accounts of their proceedings should be generally circulated, and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller."

Though, therefore, the defendant was not authorized by the House of Commons, to publish the report in question, yet as he only published a true copy of it, I am of opinion that the rule ought to be discharged."

This case calls for several observations. In the first place the only question before the court was, whether under the circumstances they would permit a criminal information to be filed, a matter which is usually regarded as discretionary. In the next place it is to be remarked that, although, the learned judges gave reasons for refusing the rule, which if well founded would go to the general extent of sanctioning all true reports of parliamentary and judicial proceedings ; yet *that*, ac-

cording to several late decisions, the legal privilege of publishing such proceedings is subject to very considerable limitations. And, that the authority of this case to so great an extent has been much questioned (*f*).

Notwithstanding the analogy assumed to exist between the publication of parliamentary proceedings and of judicial reports, there seems to be a wide and manifest distinction between them. With respect to many parliamentary proceedings, so far it is from being *legally* essential to the interests of the public that they should be divulged, that a party who publishes them is in strictness guilty of a breach of privilege. Courts of justice, on the other hand, are open to all, the common law of the land is to be learned principally by attention to the practice and proceedings of such courts, and therefore it is of essential importance to the public that such proceedings should, to a great extent at least, be communicated to all.

And the court in holding, that no parliamentary proceeding can be deemed libellous, seem to have regarded the subject too abstractedly, and without

(*f*) See the observations of Lord Ellenborough, C. J. and Grose, J. in *Stiles v. Nokes*, 7 East, 493. *R. v. Fisher*, 2 Camp. 563. *R. v. Fleet*, 1 B. & A. 379. *R. v. Carlile*, 3 B. & A. 167. *Lewis v. Clement*, 3 B. & A. 702. *Flint v. Pike*, 4 B. & C. 473.



reference to the time, occasion, and circumstances attending the publication.

The question whether a particular publication shall be deemed to be illegal or even criminal, may depend not merely on the matter published, but on the occasion and circumstances of the publishing. It frequently happens, that the publication of that which is injurious is not justifiable, although the original publication was privileged and sanctioned by the particular occasion and circumstances (*g*). Thus, in Lord Abingdon's case, it was held that a peer who publishes libellous matter in the public prints, as having constituted part of his speech in parliament, is as open to an action or prosecution as any private individual (*h*).

And in the case of *the King v. Creevy* (*i*), it

(*g*) See *Lake v. King*, 1 Saund. 131. *supra*. There it was held that the printing a petition to the House of Commons, for the use of the members of that house, was justifiable, because that was according to the ordinary course of proceeding, but that any other publication not authorized by parliamentary practice would have been illegal. So in the case of *Flint v. Pike*, 4 B. & C. 473. it was held that it was not justifiable to publish the speech of a counsel reflecting on the character of an individual, although no action was maintainable against the counsel.

(*h*) *R. v. Lord Abingdon*, 1 Esp. C. 226.

(*i*) 1 M. & S. 273. Le Blanc, J. at the trial, in summing up to the jury, informed them that they were to consider, whether the publication tended to defame the prosecutor; that he

was held, that a member of the House of Commons was liable to be convicted on an indictment for a libel, in publishing in a newspaper the report of a speech, delivered by him in the house, which contained libellous matter upon an individual.

On principles of public convenience the ordinary rule is, that no action can be maintained in respect of a fair and impartial report of a judicial proceeding.

This rule is subject to several natural and necessary limitations, first, as to the *subject matter* of the report, and secondly, as to the *manner* in which the proceeding is reported.

was of opinion, that it did, but left the question to them. He further stated that where the publication is defamatory, the law infers malice, unless any thing can be drawn from the circumstances attending the publication to rebut that inference, and left it to them to say whether the circumstances did rebut that inference; informing them that in point of law the circumstance of its being a publication of a speech delivered by a member of the House of Commons, did not rebut it. The jury found the defendant guilty, and the Court of King's Bench afterwards held that the conviction was proper. Lord Ellenborough in reference to the observations of the court, in the case of *The King v. Wright*, said he should hesitate in pronouncing it to be a *proceeding* in parliament. He also observed that, when it became necessary to discuss the case of *Curry v. Walter*, he should say that the doctrine there laid down must be understood with very great limitations, and that he should never fully assent to the unqualified terms attributed in the report of that case to Eyre, C. J.

First as to the *subject matter*. As the privilege in such cases is founded upon grounds of public policy and convenience, it ~~ceases~~ where the nature of the investigation is such, that to publish it would obviously be offensive and injurious to the public, as where it involves blasphemous or indecent matters. Where the very object of the inquiry was to protect the interests of religion, morality, decency, and good order, by repressing impious blasphemous and obscene or seditious publications, it would not only be impolitic but weak and absurd to allow the same matters to be afterwards published with impunity as parcel of the judicial proceeding.

In the case of *the King v. Carlile* (k), a criminal information was granted against Mary Carlile, for a libel, entitled the mock trial of Mr. Carlile, but which contained a correct account of what had taken place upon that trial, in the course of which the whole of Paine's *Age of Reason* had been read. And the court held, that though, as a general position, it was certainly lawful to publish the proceedings of courts of justice, yet that it must be taken with this qualification, that what is contained in the publication must be neither defamatory of an individual, tending to excite disaffection, nor calculated to offend the morals of the people ; for if its contents were calculated to produce such effects, instead of disseminating

(k) 3 B. & A. 167.

useful knowledge, it would produce great mischief (*l*).

The publication, also, of ex-parte proceedings in criminal cases is not only not privileged by the law, but is regarded as a great misdemeanor. Where the evidence is ex-parte, the party charged has no means of establishing a defence, and such premature statements tend to excite undue prejudices against the accused, and to deprive him of the benefit of a fair and impartial trial; and therefore, in several instances, the publication of matters of criminal charge, contained in depositions before magistrates, has been held to be indictable (*m*).

(*l*) See the observations of Best, J., *ibid*. Bayley, J. observed, that the case of *Curry v. Walter* must be taken with great qualifications.

(*m*) See the *King v. Fisher and others*, 2 Camp. 563. The printer, publisher, and editor of a public newspaper, were indicted for publishing a paragraph, purporting to contain the examinations before a magistrate, upon a charge brought against the prosecutor by Mrs. Popplewell; the publication then proceeded to assume the truth of the depositions, and the guilt of the prosecutor, and to pronounce that he would meet with the reward due to his villainy.

It was contended, on the authority of several of the cases above cited, that the publication was justifiable, as being a true account of the proceedings in a court of justice.

But Lord Ellenborough, C. J. said, "Trials at law fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them con-

And as the publishing such preliminary and ex-parte statements is an illegal act in respect of

tinue so privileged, the benefit they produce is great and permanent, and the evil that arises from them is rare and incidental; but these preliminary examinations have no such privilege, their only tendency is to prejudice those whom the law still presumes to be innocent, and to poison the sources of justice. It is of infinite importance to us all, that whatever has a tendency to prevent a fair trial should be guarded against. Every one of us may be questioned in a court of law, and called upon to defend his life and his character; we should then wish to meet a jury of our countrymen with unbiassed minds; but for this there can be no security, if such publications are permitted."

In the case of the *King v. Fleet*, 1 B. & A. 379, a criminal information was granted against the printer and publisher of a newspaper for publishing his minutes of the evidence taken before a coroner's inquest on a charge of murder, accompanied by comments on the facts as they occurred.

Bayley, J., adverting to the publication of the minutes, observed, "That is a matter of great criminality; for the inquest before the coroner leads to a second inquiry, in which the conduct of the accused is to be considered by persons who ought to have formed no previous judgment of the case. It is a statement of evidence taken wholly ex-parte, and where there is no opportunity for cross-examination. A jury who are afterwards to sit upon the trial ought not to have ex-parte accounts previously laid before them. They ought to decide solely upon the evidence which they hear on the trial. It is therefore highly criminal to publish before such trial an account of what has passed on the inquest before the coroner.

Abbott, J. "Every person who has attended to the operations of his own mind, must have observed how difficult it is

its tendency to obstruct the due course of public justice; and as the same act makes a special prejudice to the particular individual, not only by its tendency to deprive him of the benefit of a fair and impartial trial, but by the particular disparagement to his reputation and character in society, the publisher is, on the ordinary principle, subject to an action, at the suit of the injured individual (n). In the late case of *Duncan v. Thwaites* (o), it was expressly decided, that the defendant could not justify the publication of a charge imputing to the plaintiff indecent conduct to a female child, on the ground that the alleged libel was no more than a correct account

to overcome preconceived prejudices and opinions, and that more especially in matters of sentiment or passion. It is, therefore, most mischievous to the temperate administration of justice, that a person, either during or before a judicial examination, should publish a statement of facts which are to be made the subject of a subsequent trial; and it is still more mischievous when that statement is accompanied with comments. It is impossible to say that much which exists in this case is not calculated to create a prejudice in the public mind."

(n) Thus, though a nuisance to a public highway be in itself a public offence, and indictable as such, and is not, in the absence of damage to a particular individual, the subject of an action, yet if by reason of such public offence any damage accrues to any individual in particular, he may maintain an action.

(o) 3 B. & C. 556.

of the proceeding which had taken place at a public police-office (*p*).

And although the objections to the publication of *ex-parte* statements do not apply so forcibly to civil as they do to criminal proceedings, yet it seems that the publication of *ex-parte* proceedings, even of a civil nature, when they are injurious to the characters of individuals, cannot be justified. For the communication of such *ex-parte* proceedings, may frequently be attended with great hardship to the individual, and can seldom,

(*p*) Abbott, L. C. J., in delivering the judgment of the court, upon this point said, "I take it to be a general rule, that a party who sustains a special and particular injury, by an act which is unlawful on the ground of public injury, may maintain an action for his own *special* injury; and if publications like the present impede the due administration of justice towards persons accused of offences, it is impossible to say that the individual, whose trial may be affected by them, does not sustain a special and peculiar injury, even in that view; and he certainly sustains an injury to his character of the same nature as the injury to any other person by any other species of defamation."

His Lordship further observed, in the course of pronouncing his judgment, "The publication in question impeaches the plaintiff's character; a publication impeaching private character is actionable, unless the occasion of publishing makes the publication excusable; and where the publication is a violation of the criminal jurisprudence of the country, and there is nothing to call for it, the publication is not excusable.

previous to the final decision, be of importance to the public as containing any judicial information (q).

In the case of *Duncan v. Thwaites*, although the Lord Chief Justice, pointed out some distinctions between that case and the previous case of *Curry v. Walter*, the proceeding which had been published in the former, being one which was merely *preliminary* in its nature and which might be lawfully conducted in *private*, if the magistrates engaged in it thought fit, whilst the latter proceeding was before a court instituted for final determination as well as preliminary inquiry, and whose doors are open to all who can be accommodated, and the proceeding itself had been actually terminated by refusing the application, yet his lordship desired that notwithstanding those distinctions between the case then before the court, and that of *Curry v. Walter*, it was not to be inferred that the Bench was of opinion that the publication of ex-parte proceedings, even in that court, was a matter allowable by law.

Next as to the *manner* in which a judicial proceeding is reported. As the privilege of publishing judicial proceedings with impunity, notwith-

(q) In a late case, the Lord Chancellor (Eldon) observed, that he recollected the time when it would have been matter of surprise to every lawyer in Westminster Hall, to learn that the publication of ex-parte proceedings was legal.



standing the inconvenience and mischief which such publications may occasion to individuals, is founded upon grounds of public policy and convenience; the condition necessarily annexed to immunity is, that the proceeding shall be fairly, impartially, and correctly reported.

It is, therefore, plain that this principle will not justify any misrepresentation of the facts; to mis-state any part of the proceeding would be not to benefit and instruct, but to mislead the public, and might create most intolerable mischief to individuals, inasmuch as it would annex to the calumny a degree of authenticity from its supposed connection with a solemn deliberate judicial investigation. It is not, however necessary to resort to the latter consideration for the purpose of divesting such a publication of legal defence; it is sufficient that the misrepresentation deprives the defendant of the excuse which might have been available, had he reported the facts correctly.

In the case of *Stiles v. Nokes* (r), it was observed by Lord Ellenborough, C. J. and Grose, J. that it must not be taken for granted that the publication of every matter which passes in a court of justice, however truly represented, is, under *all circumstances*, and with *whatever mo-*

(r) 7 East, 493.

*tive* published, justifiable, but that doctrine must be taken with some grains of allowance. "It often happens," said Lord Ellenborough, "that circumstances, necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry, are very distressing to the feelings of individuals on whom they reflect. The protection afforded by law to such publications does not, however, extend beyond a plain unvarnished statement of the proceeding, and will not warrant *the least misrepresentation of facts, or even any high colouring of the circumstances stated.*"

Lofield (s) having recovered in an action against Bankcroft, for maliciously charging him with felony, and for procuring him to be arrested on suspicion of the same, afterwards published that Bankcroft had *conspired* to charge him with this felony, and that, in vindication of his character, he had brought an action against him for so doing, and had recovered £1100 damages against him." On a motion for a criminal information, the court said, that the present advertisement had falsely represented the fact, for Lofield did not bring his action for a conspiracy, but for Bankcroft's maliciously charging him with felony, and

(s) Easter Term, 5 G. 2. 1732. 2 Barnard. K. B. 128.  
*The King v. Lofield.*

a conspiracy requires an infamous judgment. The rule was made absolute.

The same principle applies not only to misrepresentations of facts, but also to all partial and garbled statements, prejudicial to the character of the individual to whom they relate; such reports are, at the least, useless to the public, and to individuals oftentimes most injurious.

It is obvious, that, if it were allowable to pick out and select particular parts of a judicial proceeding, the privilege would be liable to the most grievous abuse, and that under the colour and pretence of communicating to the public useful and necessary information, which is the legitimate ground for investing such publications with peculiar and extraordinary means of protection, the reputation of individuals would be subjected to most unjust and unmerited calumny. And, therefore, a reporter is not privileged in publishing a speech of a counsel containing reflections on the character of an individual annexed to a short summary of the trial without stating the evidence (t).

So it has been held that the publishing the speech of a counsel in a judicial proceeding, cou-

(t) *Flint v. Pike*, 4 B. & C. 473. vide infra under the title *plea*. And quære whether he would be justified in publishing a *speech* reflecting on the character of an individual, even although the evidence were also published, *ibid*.

pled with a general assertion, that his statement was proved by a witness called upon that trial, cannot be justified (*u*).

The evidence ought to be stated in order that those who read the report may judge for themselves, and it is not sufficient to substitute the mere inference of the reporter (*x*).

And though the report were to state the evidence, it seems to be doubtful, whether the publication of the speech of a counsel which reflected on the reputation of another would be justifiable, unless, at least, it appeared that the observations were warranted and that the party deserved them (*y*), or that they were so connected with the case, that the detail was necessary for the information of the public (*z*).

And though a counsel might not be responsible in a common action for slander, although he made use of observations detrimental to individuals, yet it seems that a party who repeated the slanderous matter to all the world, would be liable to such an

(*u*) *Lewis v. Walter*, 4 B. & A. 605.

(*x*) Per Abbott, L. C. J. 4 B. & A. 612. "If a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence."

(*y*) See the observations of Holroyd, J. 4 B. & C. 477. *ibid.* 482.

(*z*) See the quare of Bayley, J. 4 B. & C. 476.

## CHAPTER XII.

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### *Probable Cause.*

IN the next place, the occasion of publishing may supply an absolute defence, independently of the actual intention of the publisher, but dependent on the existence of *probable* or *reasonable* cause for the act.

It has been seen (a) that the ordinary action for slander is not maintainable where the publication has been made in a judicial proceeding, according to the due course of law. But a special action on the case may be supported in respect of a malicious and unfounded prosecution. So, also, it seems, may such an action be supported against an advocate who has abused his professional situation, for improper and malicious purposes. So, also, is such an action maintainable in respect of a malicious disparagement of a man's title to an estate, though it be made by one who himself claims to be entitled. But in all these cases, and perhaps in some others, it

(a) *Supra*. Chap. 10.

seems that the existence of probable or reasonable cause for the charge or claim would constitute a legal bar to the action ; or, as it would perhaps be more correct to state it, the want of such probable cause would be essential to the action.

It is obvious that the allowing probable cause to operate as a defence must depend on principles of policy and convenience.

On general principles of expediency, the absence of probable cause is essential to the action, and the existence of probable cause is a complete bar, independently of the actual intention of the defendant in those cases where it would be impolitic on the one hand to allow the *mere occasion* to operate as an absolute bar ; but where, on the other, it would be inconvenient to make the liability depend on the *mere motive* of the publisher, and where public convenience requires that the act should be protected, provided reasonable ground for doing it really existed.

Thus, in the case of a malicious charge in the ordinary course of justice, it would be attended with great mischief and vexation if the prosecutor were to be absolutely exempted from responsibility, although he had wantonly perverted the course of law to malicious and vexatious purposes ; it might, on the other hand, be productive of evil to make a prosecutor amenable in damages when he failed to establish the charge in all cases where

he had acted maliciously; for in numerous instances it may be highly expedient that judicial investigation should take place though the prosecutor be not actuated by the love of justice, but by the basest motives of personal malice. The public may, in numerous instances, be benefited by the promotion of inquiry, notwithstanding the immorality of the prosecutor. And, therefore, where a reasonable and probable cause for making the charge really exists, and consequently where the public has an interest in promoting inquiry, be the motives of the prosecutor ever so culpable in a moral point of view, it becomes a matter of legal policy and discretion to exempt him from civil liability; and therefore, in all actions for malicious prosecutions, the want of probable cause is not only invariably essential to the action, but proof of the negative is incumbent on the plaintiff (c).

The requiring such proof from the plaintiff is not only a rule of policy and convenience, but of strict natural justice when it is considered how often it happens that the facts on which a criminal prosecution is properly founded, are confined to the knowledge of the prosecutor alone, and that if this proof were not required from the

(c) 1 T. R. 520. 1 Salk. 14, 15, 21. 5 Mod. 394, 5. 1 Vent. 86. Carth. 415. See the cases, Starkie on Evidence, it. Malicious Prosecution.

plaintiff how often a bonâ fide prosecutor would be exposed to an action against which he might have no defence, from his inability to prove the probable cause which really existed (*d*).

What shall amount to probable or reasonable cause, in this as well as other cases, may be either a question of law, arising simply on the mere facts, or it may depend on the conclusion of the jury from the facts. It is a question of law arising simply upon the facts, and independently of any general conclusion made by a jury in all cases where, from the mere facts themselves, the court can, by the aid of any rule or principle of law, draw or exclude the inference of probable cause from such facts (*e*).

(*d*) *Infra* tit. evidence, and see Starkie on Evidence, Pt. iv., 911.

(*e*) Thus in the case of *Golding v. Crowle*, M. 25 G. 3. B. N. P. 14. it is said, "if the plaintiff do prove malice, yet if the defendant show a probable cause, he shall have a verdict, and the judge, not the jury, is to determine whether he had a probable cause; and therefore, where the plaintiff having brought an action against the defendant for a malicious prosecution for perjury obtained a verdict, upon a motion for a new trial, the court set it aside, (it appearing, on the report of the judge that there was probable cause) not as a verdict against evidence, but as a verdict against law; (note a quære is added in the margin). So in the case of *Candell v. Loudon*, cor. Buller, J. Guildh. after Trin. 1785, cited in *Johnstone v. Sutton*, 1 T. R. 520. Buller, J. stated to the jury that there were two questions to be determined: 1st. whether



Where, on the other hand, the distinction between probable and improbable, reasonable or unreasonable, is not defined by any rule or principle

the facts in evidence were true ; 2dly, whether, if true, they showed a want of reasonable or probable cause ; and the learned judge added, that what is reasonable or probable cause is matter of law, and he then gave his opinion on the case. And in the case of *Johnson v. Sutton*, T. R. 493. Lords Mansfield and Loughborough, in stating their opinions for reversing the judgment, observe that the question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable or not probable are true and existed is a matter of fact ; whether, supposing them to be true, they amount to a probable cause, is a question of law, and upon this distinction proceeded the case of *Reynolds v. Kennedy*, 1 Wils. 232. In that case an action for a malicious prosecution was brought against the defendant for maliciously proceeding by information before certain sub-commissioners of the excise in Ireland in respect of certain goods of the plaintiff's, which had been condemned by the sub-commissioners, but which condemnation had been reversed on appeal to the commissioners. After a verdict for the plaintiff, judgment was arrested, and that judgment was affirmed in the K. B., upon error brought, the court being of opinion that the declaration which showed a condemnation in the first instance by the sub-commissioners was *felo de se* ; for their judgment justified the proceeding, and the reversal of their judgment, on appeal, did not afford any inference of malice on the part of the defendant below.

So in the case of *Isaacs v. Howard*, 2 Starkie's C. 167. Ld. Ellenborough delivered his opinion to the jury, that in point of law a constable was not justified in taking a party into custody, without warrant, on a charge of having received

of law, the conclusion must, it seems, be drawn by the jury (f).

The same protection which is afforded to a

stolen goods, on the mere information of a boy who was one of the principal felons. See also as to other cases, where the conclusion as to what is reasonable is considered as a question of law. Co. Litt. 56 b. 59 b. 4 Co. 27 b. *Hobart v. Hammond*, Cro. J. 204. *Stodder v. Harvey*, Cro. Eliz. 583. *Bell v. Wardell*, Willes, 202. *Ld. Mansfield*, 241. *Hill v. Yates*, 2 Moore, 80. *Starkie on Evidence*, p. iii, 416. So, again, there is no probable cause in law where the party does not act upon those facts which might of themselves have supplied probable cause, but acts against his better knowledge that there was, in truth, no probable cause; for as to one who is better informed there is no probable cause. See *Haw. P. C. b. 2. c. 12. s. 15*. *Sir Anthony Ashly's case*, 12 Co. 72. So, though a party would, in point of law, be justified in arresting another, if he acted bona fide on the opinion of a professional adviser, yet if he acted not upon that opinion, but from malicious motives, believing that he must fail, there would, in point of law, be a want of probable cause. *Ravenga v. Macintosh*, 2 B. & C. 693.

But, on the other hand, although the authorities most abundantly prove that probable or reasonable cause *may be* matter of mere judicial inference, from the mere facts, independently of the jury, it by no means follows that such must *always* be the case: on the contrary, it seems to be manifest that whenever the facts are numerous and complicated, and do not fall within any particular rule or principle of law, then the jury must draw the conclusion in fact, and that the conclusion in law will follow such conclusion in fact. Thus, in the case of *Reynolds v. Kennedy*, cited in the opinion given by Lords Mansfield and Loughborough in the case of *Johnson v. Sutton*, the court held, that the very fact that the sub-

party in a judicial proceeding is with some limitation extended to a professional advocate. He is not subject to an action, provided the facts

commissioners had, in the first instance, condemned the goods were sufficient to establish the existence of probable cause as a question of law, yet in this case, as well as in the others, where the court has made the legal inference, some prominent facts have existed on which the court could found a general rule, which was to govern not only the individual case, but all which should be within its scope. But, in many instances, the facts are so numerous and so complicated as to render it difficult to apply any general rule, and where it might be highly inconvenient to do so on account of multiplying legal rules and distinctions to a very great extent. A prosecution may be instituted on such unsatisfactory or satisfactory grounds, in point of evidence, that the court might find no difficulty in deciding as a matter of law on the absence in the one case, or the existence in the other of probable cause. Thus, in the case of *Isaacs v. Brand*, 2 Starkie's C. 167, Lord Ellenborough held that a mere declaration by a principal felon that another person had received the goods, did not afford a probable or reasonable ground for arresting the latter; on the other hand, the fact of finding stolen goods recently after the felony in the possession of another would certainly, in point of law, show probable cause for an arrest; but between such extreme cases, there may be an infinite number of intermediate ones where the law can lay down no precise rule as to the existence of reasonable cause, and consequently where the inference must be drawn by the jury. Many instances occur in practice, in actions of this nature as well as others, where the question of what is probable or reasonable is properly left to the jury. Thus, in the case of *Isaacs v. Brand*, 2 Starkie's C. 167, Lord Ellenborough left the question of probable cause, under the circumstances,

which he alleges are pertinent to the cause, and are suggested by his client; for though a counsel may be expected to exercise a discretion whether the parts which he states, if true, be material to the issue, yet it would be too much to expect that he should take notice, at his peril, whether the facts themselves be true or false. In the case of *Wood v. Guston* (*g*) it is laid down, that "if a counsel speaks scandalous words against one in defending his client's cause, an action lies not against him for so doing, for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions. In the case of *Brooke v. Sir Henry Montague* (*h*) the plaintiff brought an action against the defendant for these words; "he was arraigned and convicted of felony." The defendant pleaded, that the plaintiff, at another time, brought false imprisonment against J. S., one of the serjeants

to the jury, and his lordship pursued the same course in *Brookes v. Warwick*, 2 Starkie's C. 389. And in general it seems that where no acknowledged rule or principle of law defines the limits between probable and improbable, reasonable and unreasonable, the question is one for the jury, under all the circumstances of the case. See Lord Kenyon's observations in *Hilton v. Shepherd*, 6 East, 14 n. *Fry v. Hill*, 7 Taunt. 397. Starkie on Evidence, tit. Law and Fact, part iii. p. 418.

(*f*) See the last note.

(*g*) Styles, 462.

(*h*) Cro. Jac. 90.

of London, who justified by warrant from Sir N. Moseley, mayor of London, for arresting him, to find sureties for the good behaviour, and they were thereupon at issue, and found against the plaintiff, who thereupon brought an attain. And that the defendant, being *consiliarius et peritus in lege*, was retained to be of counsel with the petty jury, and in evidence at the trial in London, spake those words in the declaration ; and Yelverton and Coke, attorney-general, being of counsel for the defendant, the court resolved that the justification was good, for a counsellor in law retained hath a privilege to enforce any thing which is informed unto him for his client, and to give it in evidence, it being *pertinent to the matter in question*, and not to examine whether it be true or false ; but it is at the peril of him who informs it ; for a counsellor is, at his peril, to give in evidence that which his client informs him, being pertinent to the matter in question, otherwise action on the case lies against him by his client, as Popham said ; but matter not pertinent to the issue or the matter in question he need not deliver, for *he is to discern, in his discretion*, what he is to deliver and what not, and although it be false he is excusable, being pertinent to the matter ; but if he give in evidence any thing *not material* to the issue, which is scandalous, he ought to aver it to be true, otherwise he is punishable ;

for it, shall be intended as spoken maliciously and without cause, which is a ground for an action. So, if a counsellor object matter against a witness which is slanderous, if there be cause to discredit his testimony, and it be pertinent to the matter in question, it is justifiable what he delivers by information, although it be false; so *here it is material evidence to prove him a person fit to be bound to his good behaviour, and in maintenance of the first verdict*, therefore his justification is good.

The same principle extends to a comment made by a counsel upon facts proved in the cause, or proposed to be proved and relevant to the matter in issue (i).

(i) *Hodgson v. Scarlett*, 1 B. & A. 232. The words stated in the first count of the declaration were these, "some actions are founded in folly, some in knavery, some in both; some in the folly of the attorney, some in the knavery of the attorney, some in the folly and knavery of the parties themselves; Mr. Peter Hodgson was the attorney of the parties, drew the promissory note, and fraudulently got Bowman to pay into his hands £150 for the benefit of the plaintiff. This was one of the most profligate things I ever knew done by a professional man. Mr. Hodgson is a fraudulent and wicked attorney." In the second count, the words were stated "Mr. Hodgson is a fraudulent and wicked attorney;" plea general issue. At the trial at the Lancaster Assizes, before Wood Baron, Raine opened the case and stated that the action was brought for words spoken by the

It seems, however, to be doubtful whether, even in the case of an advocate, if it could be proved that he acted of express malice, and without probable or reasonable cause, an action might not be maintained; and the court in the case last cited gave no opinion on the subject; but it seems that, at all events, the plaintiff could not even then recover in an ordinary action for defamation, but

defendant, in an address to the jury as counsel, in a cause tried at the preceding assizes, and that they were not warranted by the facts of the case; on this the learned judge said, "I take it for granted, from your opening, that there was such a cause tried, and that there was a question in it, respecting the drawing of the promissory note as mentioned, and that these words, if spoken, were part of the defendant's speech to the jury, and had reference to that transaction." To this both sides assented, and he then added, "the observations might be too severe, that I can say nothing about, but, as they were relative to the subject matter of the cause as at present advised, I think the action not maintainable. The learned judge, therefore, being of opinion that it was not for the jury to try whether the cause or occasion for speaking the words was sufficient to warrant them, thought there was nothing to leave to them, even supposing the words to be proved, and nonsuited the plaintiff.

The court of King's Bench afterwards refused to grant a new trial, on the ground that the words complained of were relevant and pertinent to the original cause in which they had been uttered, and consequently, that, according to the principle laid down in the case of *Brooke* against *Sir Henry Montague*, they were not actionable.

must resort to a special action, alleging express malice (*k*) and the want of probable cause.

Again where a party extra-judicially asserts his title to the lands of another, the very fact of his making a claim precludes the owner who is injured

(*k*) See the observations made by Holroyd, J. in the case of *Fairman v. Ives*, 1 B. & A. 645. In the case of *Hodgson v. Scarlett*, 2 B. & A. the same learned judge observed, with a view to the due administration of justice, counsel are privileged in what they say; unless the administration of justice is to be fettered, they must have free liberty of speech in making their observations, which it must be remembered may be answered by the opposing counsel, and are commented on by the judge, and are afterwards taken into consideration by the jury, who have an opportunity of judging how far the matter uttered by the counsel is warranted by the facts proved; therefore, in the course of the administration of justice, counsel have a special privilege of uttering matter even injurious to an individual, on the ground that such a privilege tends to the administration of justice. And if a counsel, in the course of a cause, were to utter observations injurious to individuals, and not relevant to the matter in issue, it seems to me that he would not therefore be responsible to the party injured, in a common action for slander, but that it would be necessary to sue him in a special action on the case, in which it must be alleged in the declaration, and proved at the trial, that the matter was spoken maliciously and *without reasonable and probable cause*. This may be illustrated by the common case of a false charge of felony exhibited before a justice of the peace; there an action upon the case, as for defamation, will not lie, because the slander is uttered in the course of the administration of justice, but the party complaining is bound to allege that it was made without reasonable or probable cause.



by it from recovering in an ordinary action for slander, independently of any inquiry as to the sincerity of the claimant (*l*); for it would be highly inconvenient and impolitic to subject the motive and intention of a claimant generally to legal inquiry. But, on the other hand, where a party makes such a claim *maliciously* and *without any probable cause*, he is liable to a special action alleging malice and the want of probable cause (*m*).

So that if B. published that he had a lease of Blackacre for one thousand years, he would not be liable to an ordinary action for slander though he had no such lease (*n*). But still he would be liable to a special action on the case if he made such an assertion knowing it to be false, or, as it seems, without any probable cause.

(*l*) For, according to the judgment of the court, in the case of *Gerrard v. Dickenson*, 4 Co. 18. if an action should lie where the defendant himself claims an interest, how can any make claim or title to any land, or begin any suit, or seek any advice, or seek advice and counsel least he should be subject to an action which would be inconvenient, and that this was agreeable to the opinion in *Banister's* case, that no action lies against one who publishes another to be his villain without adding something by way of threat which occasions special damage.

(*m*) *Infra*. 289.

(*n*) Jenk. 247. Cro. E. 14. Mo. 144, 188, 410. Roll. R. 409. 4 Rep. 18. Yelv. 89. Cro. Car. 140. Cro. J. 197. 485. 1 Roll. R. 244. 3 Buls. 75. Pul. 529.

The plaintiff (o) declared, that he was seised of the manor and castle of H. by purchase from Lord Audley, and that he was about to demise the castle and manor of H. to Ralph Egerton for a term of twenty-two years ; that the defendant said, "I have a lease of the castle and manor of H. for ninety years," and then and there showed and published a demise, supposed to be made by George Lord Audley, grandfather to the said Lord Audley, for ninety years, to Edward Dickenson her husband, and published the said demise as a good and true lease, when, in fact, the lease was counterfeited by her husband, and the defendant *knew it to be counterfeited*; by reason of which words, the said R. E. did not proceed to accept the plaintiff's lease. The defendant, in her plea, denied her knowledge of the forgery; and the plaintiff demurred. And it was resolved,

1. That if the defendant had affirmed and published that the plaintiff had no right to the castle and manor of H., but that she herself had right to them, in that case, because the defendant herself pretended right to them, although in truth she had none, no action would lie.

And, therefore, that for the said words "I have a lease of the manor of H. for ninety years, al-

(o) *Sir G. Gerard v. Dickenson*, 4 Rep. 18. Cro. Eliz. 197.

though it is false, yet no action lies for slandering his title or interest in the said castle or manor (*p*).

2dly. That there was other matter in the declaration sufficient to maintain the action, and that was because it was alleged in the declaration, that the defendant knew of the communication of the making of the lease to R. Egerton, and knew, also, that the lease was forged and counterfeited, and yet, against her knowledge, she had affirmed and published that it was a good and true lease.

So in the case of *Goulding v. Herring* (*q*) it was agreed, that though the plaintiff claims title, yet if it be found to be done *maliciously*, the action lies; but if, upon evidence, any probable cause of claim appears, it ought not to be found maliciously. So, according to Rolle, C. J. (*r*) "If I have colour of title to land, and I say to another, I have better title to the land than you, no action will lie against me, though my title be not so good as the other is."

Hence it appears, that although the making such a claim be sufficient to repel the ordinary

(*p*) And note, that although it appeared by the defendant's bar, that she had no interest in the lease, yet as the matter alleged in the declaration did not maintain the action, the bar would not make it good.

(*q*) 1 Rol. 141.

(*r*) Sty. 414.

action for slander, yet that a special action lies where a party makes such a claim vexatiously, and without probable cause. Those cases where a party who disparages the title of another makes no claim himself fall, as will be seen, under a very different consideration.

## CHAPTER XIII.

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### *Malice in Fact.*

IN the next place, when do the occasion and circumstances of the publication afford a qualified defence dependent on the absence of express malice? In other words when is express malice or malice in fact essential to the right of action? The extensive principle which governs this class of cases, where the existence of express malice is a test of civil responsibility, comprehends all where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even that of another called upon him to perform; as, on the one hand, it would be contrary to common convenience to fetter mankind in their ordinary communications by the apprehension of vexatious litigation; so, on the other, would it be highly mischievous to allow men to inflict the most cruel injuries to reputation and character with impunity under the cloak and pretence of discharging some duty to themselves or to society, when they were, ... actuated by the most malicious intentions.

law, therefore, in such instances, and, as it seems, most wisely, makes the issue to depend on the existence or the absence of express malice ; and thus an ample shield of protection is extended to all who act fairly and prudently, in order that men may not be deterred, by the fear of an action or prosecution, from making communications which are either important to themselves or beneficial to the public.

Among the most prominent of the decisions comprehended within the present class are those which have arisen from actions brought by servants against masters.

The giving a character of a servant is one of the most ordinary communications which a member of society is called on to make, but it is a duty of great importance to the interests of the public, and in respect of that duty, a party offends grievously against the interests of the community in giving a good character where it is not deserved ; or against justice and humanity in either injuriously refusing to give a character (*a*), or in designedly misrepresenting one to the detriment of the individual.

The general rule is, that where a master gives a character of a servant, unless the contrary be expressly proved, it will be presumed that the

<sup>1</sup> No action will lie against a master for refusing to give a character. *Carrol v. Bird*, 3 Esp. C. 204.

character was given without malice (*b*), and the plaintiff, to support the action, must prove that the character was both *falsely* and *maliciously* given.

An action was brought (*c*) by the plaintiff for publishing the following letter to one Collier, respecting the plaintiff's character as a servant; "Two days I gave him money to go into the city and buy books. When he came home, I desired him to reckon up his account; he did so. But being one day more curious than I sometimes was, I looked over his account, article by article; and in one book I well knew the price of, I found he had charged me one shilling more than it cost, and that shilling he kept in his pocket. The next day, the very same affair; and both these days my neighbour Metcalf was in my shop, and knows it well, and said he would not keep such a man a day, or something to that purpose. Two magazines he charged two shillings for binding, the people received no more than 1s. 8d. and this I can prove." A verdict

(*b*) Burr. 2425. *Edmonson v. Stephenson*, B. N. P. 8. Lord Ellenborough, in *Hodgson v. Scarlett*, 1 B. & A. 240. observed, "In the case of master and servant, the convenience of mankind requires that what is said in fair communication between man and man should be privileged, if made *bonâ fide*, and without malice. If, however, the party giving the character knows what he says to be untrue, that may deprive him of the protection which the law throws around such communications.

(*c*) *Weatherstone v. Hawkins*, 1 T. R. 110.

was found for the plaintiff on one of the counts of the declaration, containing the above letter, subject to the opinion of the court on the following case:

The plaintiff was brother-in-law to Mr. Collier; he was in the service of the defendant, and was by him turned away. Rogers, to whom the plaintiff was recommended to be taken as a servant, applied to the defendant for a character, which not being advantageous, but to the effect stated in the declaration, he (Rogers) did not take him. Collier, upon this, repeatedly called upon the defendant, upon which the letter stated in the declaration was written, with an intent to prevent an action by the plaintiff for the words spoken by the defendant to Rogers. The writ was sued out on the very day the letter was written.

The question for the opinion of the court is, whether this action lies.

Lord Mansfield, C. J. "I have held more than once, that an action will not lie by a servant against his former master, for words spoken by him in giving a character of the servant."

The general rules are laid down as Mr. Wood (the plaintiff's counsel) has stated; but to every libel there may be a necessary or implied justification from the occasion, so that what, taken abstractedly, would be a publication, may, from the occasion, prove to be none, as if it were read in



a judicial proceeding. Words may also be justified on account of their subject matter, or other circumstances. In this case, instead of the plaintiffs shewing it to be false and malicious, it appears to be incident to the application *by Rogers to the* master of the servant ; and the letter was written to the brother-in-law of the plaintiff, for the express purpose of preventing an action being brought."

Buller, J. " This is an exception to the general rule, on account of the occasion of writing the letter. Then it is incumbent on the plaintiff to prove *the falsehood of it* : and in actions of this kind, unless he can prove the words to be *malicious* as well as *false*, they are not actionable."

Judgment for the defendant.

In the case of *Rogers v. Sir Gerrase Clifton, Bart. (d)* the following facts appeared in evidence. The plaintiff having been hired as a servant by the defendant, lived about six months in his service, when the latter turned him away without giving him a month's warning ; in consequence whereof, the plaintiff, conceiving himself entitled to a month's wages, refused to quit the service without being paid that sum. On this refusal, the defendant procured an officer from the public office to put the plaintiff out of the house, and employed his attorney to settle his

wages with him. Immediately after this, the defendant, who was going into the country, called on Mr. Holland, with whom the plaintiff had previously lived, to inform him that the plaintiff had behaved in an impertinent and scandalous manner, that he the defendant had discharged him from his service, when the plaintiff refused to go without a month's wages; and he therefore desired Mr. Holland not to give him another character. While the plaintiff was in the country, he offered himself to a Mr. Hand, stating that he had lived with the defendant. Upon which, Mr. Hand wrote to the defendant for a character, and received the following answer :

"Sir,—In answer to your's, which came to hand yesterday, I beg leave to acquaint you, that Thomas Rogers did not live with me six months, as he has told you, and I wish I had never taken him into my house, as he is a bad-tempered, lazy, impertinent fellow, and has given me a great deal of trouble, as I was obliged to send an officer from the Marlborough-street Police Office to put him and his things out of my house, and also to employ Mr. Barnet, my attorney, of Soho-square, to settle his wages, as I look upon it he will take any advantage he can.

"I am, Sir, your most obedient humble servant,

"GERVASE CLIFTON."

Upon receipt of this letter, Mr. Hand refused to take the plaintiff into his service. It appeared that Mr. Holland never was applied to for a character of the plaintiff, after the communication made to him by the defendant ; and Mr. Holland stated, that without such communication he should have declined giving another character to the plaintiff. The plaintiff also proved, by servants of the family, that while in the defendant's service he had conducted himself well, and that no complaints of the nature ascribed to him in the defendant's letter had all that time existed. The jury found a verdict for the plaintiff with £20 damages, but liberty was reserved to the defendant to have a nonsuit entered.

After the case had been argued, Lord Alvanley, C. J. said, " If it were to be understood, that whenever a master gives a bad character to a servant who has quitted his service, he may be forced by the servant, in justification of such his conduct as a master, to prove the particulars which he has stated respecting the servant, it would be impossible for any master, (so understanding the law, at least with any regard to his own safety) to give any character but the most favourable to a servant, and consequently impossible for a servant, not entitled to the most favourable character, to obtain any new place. In the two

cases of *Edmonson v. Stevenson* (e), and *Weatherstone v. Hawkins* (f), the law upon this subject appears to me to be laid down as clearly as can be wished. Unquestionably the master, who has given a bad character of a servant to persons inquiring after his character, is not bound to substantiate by proof what he has said ; but it is equally clear, that the servant may, if he can, prove the character *to be false*, and the question between the master and servant will always, in such case, be, whether what the former has spoken concerning the latter be malicious and defamatory. In this case, we are to consider whether the evidence adduced by the plaintiff was sufficient to be left to the jury." His lordship, after stating the evidence, proceeded to observe, that the circumstance of the plaintiff's refusal to quit his master's house till his wages had been paid, was the only act of impertinence proved against him ; and that the defendant was not called upon by that single act to seek out Mr. Holland, and officiously to state what he did ; that if a servant were strongly suspected of having committed a felony whilst in his master's service, it would be the master's duty to warn others from taking him into their service ; but that, in the principal case, the offence imputed to the plaintiff appeared

(e) B. N. P. 8.

(f) 1 T. R. 110.

to be of a trivial nature. His lordship concluded by saying, that he should have grievously invaded the province of a jury, had he not left it to them to say whether, considering all the circumstances of the case, the defendant's conduct was not malicious, and that he did not consider himself at liberty to disturb the verdict they had given.

Rooke, J. was of the same opinion, and wished it to be understood as his opinion, that a master may at any time, *whether asked or not*, speak of the character of his servant, provided that he speak in the honesty of his heart ; and that an action cannot be maintained against him for so doing ; at the same time, masters are not warranted in speaking ill of their servants from heat and passion.

Chambre, J. referred to the case of *Lowry v. Aikenhead* (g), before Lord Mansfield. In that case, the rule laid down by Lord Mansfield was, " That where a person, intending to hire a servant, applies to a former master for a character, the master is not bound to prove the truth of the character he gives ; for what he speaks of the servant he does not speak officiously, but only discloses that which rests in his knowledge alone ; but that where a master speaks ill of a servant, without any previous application having been

(g) Mich. 8 G. 3.

made to him there, he must plead and prove the truth of the character in justification.

And the rule was discharged.

It appears, therefore, to be fully established, that a servant, in an action against a former master, must prove express malice.

It seems to have been laid down generally by Lord Mansfield, in the case cited by Mr. Justice Chambre, that where a master, *unasked*, gives a bad character of a servant, he must justify as in other cases ; and though Mr. J. Rooke seems to have expressed an opinion somewhat different, there can be no doubt that the manifestation of forward and officious zeal on the part of a defendant, who, *uninvited*, gives a character to the prejudice of his former servant, would be a material guide to a jury in ascertaining his real motive.

Where a plaintiff, knowing the character which his master will give, procures it to be given for the sake of founding an action upon it, he will not be allowed to recover (*h*).

Many other cases may be referred to as illustrative of the general principle that a publication warranted by an occasion apparently beneficial and honest is not actionable in the absence of express malice.

The defendant who was sergeant in a volunteer

(*h*) Per Lord Alvanley, 3 B. & P. 592. *King v. Waring* et ux. 5 Esp. C. 13.

corps of which the plaintiff, also, was a member, represented to the committee, by whom the general business of the corps was conducted, that the plaintiff was an unfit and improper person to be permitted to continue a member of the corps.

The words charged in the declaration were, that the defendant had said that the plaintiff had been the executioner of the King of France, and that he had clapped his hands, rejoicing at the event, adding, that France would then be one of the first countries in the world.

It appeared in evidence, that the plaintiff was a Frenchman, and that the defendant had not made use of the words publicly, but had communicated them to the officers of the corps, who constituted the committee for its regulation.

Lord Ellenborough said, that it was not to be allowed that such an action could be sustained. It was a communication made upon a most important matter for their consideration, whether foreigners, the natives of a country in open war with us, were to learn the use of arms in a country threatened to be invaded by that other. The action was most ill advised and improper.

In *Johnson v. Evans* (i), the words were, "She is a thief, and tried to rob me of part of her wages." It appeared, upon the trial, that the

(i) 3 Esp. C. 32.

plaintiff had been servant to the defendant. Upon a dispute taking place he discharged her, and some difference arising respecting the payment of her wages, he charged her with having attempted to cheat him respecting her wages, and spoke the words as laid ; but the plaintiff failed in proving them to have been spoken at that time. Having, however, sent for a constable, in order to take her into custody, he made use of the same words to the constable when he came, to whom he meant to have given her in charge, but which in fact he did not do. The constable proved the words as spoken ; but it further appeared, in the course of his evidence, that the words had been spoken by the defendant, addressed to him in his character of constable, and in the course of the charge and complaint which the defendant made to him against the plaintiff.

Lord Eldon, C. J. said, that the evidence given of the speaking of the words laid in the declaration was not such as to induce him to direct the jury to find a verdict for the plaintiff. Words used in the course of a legal or judicial proceeding, however hard they might bear upon the party of whom they were used, were not such as would support an action for slander. In this case, they were spoken by the defendant under a belief of the fact, and when he was about to proceed legally to punish it, it would be a matter of *public*



sentation of the said Sir John in the form of a man of ludicrous and ridiculous appearance, holding a pocket-handkerchief to his face, and appearing to be weeping ; and also a certain false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the representation of Sir John, representing a man loaded with and bending under the weight of three large books, one of them having the word *Baltic* printed on the back thereof, and a pocket handkerchief appearing to be held in one of the hands of the said representation of a man, and the corners thereof appearing to be held or tied together as if containing something therein, with the printed word *Wardrobe* depending therefrom, for the purpose of rendering the said Sir John ridiculous, and thereby meaning that one copy of the said first-mentioned book of the said Sir John, and two copies of the book of the said Sir John secondly above-mentioned, were so heavy as to cause a man to bend under the weight thereof ; and that his the said Sir John's wardrobe was very small, and capable of being contained in one pocket-handkerchief." The declaration concluded by laying, as special damage, that Sir John had been prevented from selling to Sir Richard Phillips, for £600., the copyright of a book of which the said Sir John was the author, containing an account of a tour of the said Sir John through part of Scotland.

Lord Ellenborough, as the trial was proceeding, intimated an opinion, that if the book published by the defendant only ridiculed the plaintiff *as an author*, the action could not be maintained.

Garrow, for the plaintiff, allowed, that when his client came forward as an author, he subjected himself to the criticism of all who might be disposed to discuss the merits of his works, but that criticism must be fair and liberal ; its object ought to be to enlighten the public, and to guard them against the supposed bad tendency of a particular publication presented to them, not to wound the feelings and ruin the prospects of an individual ; if ridicule was employed, it should have some bounds. While a liberty was granted of analyzing literary productions, and pointing out their defects, still he must be considered as a libeller, whose only object was to hold up an author to the laughter and contempt of mankind. A man with a wen upon his neck perhaps could not complain if a surgeon, in a scientific work, should minutely describe it, and consider its nature and the means of dispersing it ; but surely he might support an action for damages against any one who should publish a book to make him ridiculous on account of his infirmity, with a caricature print as a frontispiece. The object of the book published by the defendant clearly was,

the party writing the criticism followed the plaintiff into domestic life for the purposes of slander, that would have been libellous ; but no passage of this sort has been produced, and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may, for aught I know, be very valuable ; but, whatever their merits, others have a right to pass their judgment upon them,—to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people wasting both their time and money upon trash.—I speak of fair and candid criticism ; and this every one has a right to publish, although the author may suffer loss from it. Such a loss the law does not consider as an injury, because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled.

“ Nothing can be conceived more threatening to the liberty of the press than the species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold.” The Chief Justice concluded by directing the jury, that if the writer of the publica-

tion complained of had not travelled out of the work he criticised for the purpose of slander, the action would not lie ; but if they could discover in it any thing *personally slanderous* against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly. — Verdict for the defendant (o).

In the case of *Tabert v. Tipper*, alluded to in

(o) In the case of *Stuart v. Lovell*, 2 Starkie's C. 73. the plaintiff being one of the proprietors of the Courier newspaper, brought his action against the defendant and the editor of the Statesman: Lord Ellenborough, in summing up to the jury, observed, "In the first the plaintiff was described as the prostituted Courier, and his full blown baseness and infamy were represented as holding him fast to his present connections, and preventing him from forming new ones. It was certainly competent to one public writer to criticise another, exerting his talents in all the latitude of free communication belonging to a public writer, and so it appeared to Lord Kenyon, in the case of *Herriot v. Stuart*, 1 Esp. c. 437. That the opinions and principles of a controversial writer were open to criticism and ridicule, in the same way as those of any other author, but that the privilege did not extend to calumnious remarks on the private character of the individual. In that respect the editor of a newspaper enjoyed the rights of protection in common with every other subject.

"Since then, the defendant in this case had stigmatised the plaintiff as the venerable apostle of tyranny and oppression, and as a man whose full blown baseness and infamy held him fast to his present connections, because they left him without

the preceding one (*p*), the action was brought for a libel on the plaintiff, contained in a periodical work called "The Satirist, or Monthly Meteor," insinuating that the plaintiff (who was a vendor of children's books) had published and vended books of an improper and immoral tendency.

Upon the question, whether a witness ought to be cross-examined as to the defendant's having published particular books,

Lord Ellenborough observed, "The main question here is, *quo animo* the defendant published the article complained of; whether he meant to put down a nuisance to public morals, or to prejudice the plaintiff. To ascertain this, it is material to know the general nature of the defendant's publications to which the libel alludes, and I therefore think that the evidence is receivable. The plaintiff is bound to shew that the defendant was actuated by malice, and the defendant discharges himself by proving the contrary. Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of

the power of forming new ones; in all this, he undoubtedly had overstepped the limits which had been drawn, and by which his conduct ought to have been regulated."

(*p*) 1 Camp. C. 350.

science. That publication, therefore, I shall never consider as a libel, which has for its object not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."

But in the same case it appeared that the libel falsely imputed to the plaintiff the publication of some silly verses of an improper tendency, which were specified in the libel, and set forth in the declaration; and it was allowed, on the part of the defendant, that the plaintiff had not published them, but it was contended that they were a fair specimen of his publications.

Lord Ellenborough, however, informed the jury, that it was certainly actionable, gravely to impute to a bookseller having published a poem of this sort, to which he was a stranger; as the evident tendency of the unfounded imputation was to hurt him in his business.

In the case of *Heriot v. Stuart* (q), it was held that no action was maintainable for asserting in a newspaper that another public paper was the most vulgar, ignorant, and scurrilous journal ever published in Great Britain. But subsequent words, alleging that it was the lowest paper in circulation,

(q) 1 Esp. C. 437.

were deemed actionable, since they affected the sale and the profits to be made by advertising.

In the case of *Dibdin v. Bostock* (r), which was an action for publishing a paragraph in a newspaper, stating that the songs at a place of public entertainment were not of the plaintiff's composition, as they professed to be, and representing the performances as despicable, and as gaining no applause except from persons hired for the purpose. Lord Kenyon observed, "The editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment, but it must be done fairly, and without malice or view to injure or prejudice the proprietor in the eyes of the public; if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, it is a libel, and actionable."

In the late case of *Dunne v. Anderson* (s), it seems to have been doubted whether the plaintiff, by preferring a petition to parliament against the practice of empiricism, had laid himself open to a criticism on his composition which attempted to show that the petitioner's ignorance in his profession was manifest on the face of his own petition.

(r) 1 Esp. C. 29.

(s) 3 Bing. 88.

The instances already cited, in illustration of the general principle, which makes the occasion operate as a defence, unless express malice be proved, are those where the occasion consists in the discharge of a duty of a public nature, the same principle it is next to be seen has an extensive application, where a party acts fairly, and *bonâ fide* in the prosecution of his own, or even of another's interest.

It has been seen, that where a publication is made in the course of a judicial proceeding, no action for slander is maintainable, the very occasion furnishes an absolute defence. And where an application is made for the purpose of obtaining redress, though it be to a party who has no direct means of giving relief, yet, if the applicant may possibly obtain such relief indirectly and he act *bonâ fide*, it seems that he is not liable to an action. In the case of the *King v. Bayley* (a), the defendant had addressed a letter to General Willes, and the four principal officers of the Guards, to be by them presented to the king, stating that the prosecutor had obtained from him (the defendant,) a warrant for the payment of money due to him from the government, under promise of paying the defendant such money, and that the prosecutor had received the money, and had not paid it over to the defendant. And

(a) 3 Bac. Ab. Libel, A. 2. cited by Bayley, J. 5 B. & A. 647.



the court held that this was no libel, but a representation of an injury shown up in a proper way for redress,—yet neither the officers nor the king could give the defendant direct assistance in obtaining payment of the money wrongfully withheld (b).

So also in the case of *Fairman v. Ives* (c); it was held, that a petition addressed by a creditor of an officer in the army, to the secretary at war, and complaining of unjust and unfair conduct, in respect of a debt due to the defendant from the plaintiff, and written for the purpose of procuring payment of the debt, through the interference of the secretary, was not libellous, the petition containing no more than a fair and honest statement of facts, in the apprehension of the defendant.

In the case of an ordinary action for slander of title, where the defendant claims no title for himself, but either denies the plaintiff's title, directly or impliedly, by asserting a title in another,—and where for any thing that appears this is the mere wanton act of a stranger, there being nothing to explain his motive or conduct, it seems that the ordinary principle would prevail, and malice in law would result from the very act of the defendant, in doing that which was likely to occasion damage, in the absence of any circumstances which would furnish any legal justifica-

(b) See the observations of Bayley, J. 5 B. & A. 647.

(c) 5 B. & A. 642.

tion or excuse; and, therefore, the privilege which belongs to one who asserts his own claim, does not protect him in falsely asserting a title in a mere stranger. The defendant had said, "I know one who had two leases of his (the plaintiff's) land, who will not part with them at any reasonable rate." And it was held, that he could not justify, by showing that he meant to allege a title by two leases in himself (*d*). So it has been held, that if the defendant say that J. S. has a better title to the land than the tenant in possession, but make no claim himself, an action lies (*e*).

Where the defendant in an action for slander of title, was not a mere wrongful intruder, but was connected in interest, though remotely, with the transaction, the question is, whether he acted *bonâ fide*, or with a malicious intention to injure the owner,—and this is properly a question of fact for the jury, under all the circumstances.

In the case of *Smith v. Spooner* (*f*), the action was brought for preventing the sale of leasehold property, by the assignee of the lessee, against the owner of the property, who had declared at the time of putting up the property for

(*d*) *Pennyman v. Raban*, Cro. Eliz. 427. Vin. Ab. 551. pl. 11.

(*e*) Jenk. 247.

(*f*) 3 Taunt. 246.

sale; that the plaintiff could make no title. It appeared, that the defendant was present when the lot was put up, and that he then told the auctioneer that it was of no use to sell it, as the house was his own; he was the landlord, and that no title could be made to it. On this, some persons who had attended to bid, retired, and the defendant offered to purchase the lease, having also made a previous offer of the same kind. Previous to the trial, the defendant had obtained possession of the premises by an ejectment, and the plaintiff's attorney had tendered him five quarters' rent, and the costs of the ejectment, if he would deliver back the possession. The jury found a verdict for the plaintiff; but the court afterwards directed a nonsuit to be entered, on the ground that there was no evidence of express malice. But in a subsequent case (*g*), where the owner of a house had prevented the plaintiff, who held under a lease for years, from disposing of the remainder of his term, by falsely asserting that he had *no title*; the court, after a verdict for the plaintiff, refused a rule to show cause why there should not be a new trial. Lord Ellenborough, C. J. observing, that "The circum-

(*g*) *Smith v. Spooner*, K. B. Mich. 1811. Quære whether the parties were not the same as in the case of *Smith v. Spooner*, 3 Taunt. 246, in which a nonsuit was entered in the C. P. Mich. 1810.

stances of the defendant's title and interest, may rebut the implication of malice ; but here it was left to the jury, to say, whether there was malice or not."

Where the alleged slander of title was conveyed in a letter, to a person about to purchase the estate from the plaintiff, imputing insanity to Y. from whom the plaintiff purchased it, and stating that the title would therefore be disputed ; in consequence of which, the person refused to complete the purchase ; it appeared, that the defendant had married the sister of Y. who was heir apparent to her brother. And the court held, that under the circumstances, the defendant ought to have the free liberty of stating objections to the title, to the proposed purchaser, as in the case of *Gerard v. Dickenson and others*, which was not stronger than the present, though such a liberty was not to be allowed to a mere stranger, according to the rule in *Jenkins's Centuries*, *immiscet rei se alienæ (h)*, but that it was impossible to treat the defendant as a stranger ; for though he was indeed a stranger as to any vested interest, he had an interest in probable expectation, so as to induce him to bestir himself and look about, least an improper conveyance should be made injurious to his right. That the question distinctly and substantively was, whether

the defendant, in making the communication which he had made, had acted *bonâ fide*, believing it to be true (i).

An attorney to a creditor (k), who had previously committed an act of bankruptcy, stopt the sale of an estate previously mortgaged and assigned to the plaintiff, by declaring the creditor's bankruptcy, and that a docket had been made out for a commission; it turned out that an act of bankruptcy had been committed, but that no commission had been sued out. On action brought, it was held, that in order to support it, there should be proof of malice, either express or implied; that if the defendant acted *bonâ fide*, and told the truth, he did no more than his duty; and though he went beyond what was strictly true, still, if there was no material variance, and no difference made with respect to the plaintiff's title, the action was not maintainable.

In general, where a communication is made in

(i) *Pitt v. Donovan*, 1 M. & S. 639. The Learned Judge who tried the cause, had stated to the jury, that if the evidence satisfied them, as men of good sense and understanding, that Mr. Y. was insane, or if the defendant entertained a persuasion that he was insane, on such grounds as would have persuaded a man of sound sense and knowledge of business, then the defendant would be entitled to the verdict. The jury found for the plaintiff; but the court granted a new trial, on the ground that the question was not correctly left to the jury.

(k) *Hargreave v. Le Breton*, Burr. 2422.

confidence, either by or to a person entrusted in the communication, supposing it to be true, or by way of admonition or advice, it seems to be a general rule, that malice is essential to the maintenance of an action (*l*).

So far has this principle been carried, that it has even been held, that the publishing an advertisement in a newspaper, involving a suspicion that the plaintiff had been guilty of bigamy, yet being published *bond fide*, at the instance of one who was interested in the discovery, was not libellous (*m*).

(*l*) Vide supra. 217, 218.

(*m*) *Delany v. Jones*. 4 Esp. C. 191. The alleged libel was as follows :—

“TEN GUINEAS REWARD,

“Whereas, by a letter lately received from the West Indies, an event is stated to be announced by a newspaper, that can only be investigated by these means :—This is to request, that if any printer or other person can ascertain that James Delany, Esq. (the plaintiff), some years since residing at Cork, late lieutenant in the North Lincoln Militia, was married previous to nine o'clock in the morning of the 10th of August, 1799, they will give notice to — Jones (the defendant), No. 14, Duke-Street, St. James's, and they shall receive the reward.”

Lord Ellenborough, in summing up to the jury, said, “that although that which is spoken or written may be injurious to the character of the party, yet, if done *bond fide*, as with a view of investigating a fact, in which the party making it is interested, it is not libellous. If, therefore, this investigation was set on foot, and this advertisement published by the

In an action (n) for a libel on the plaintiff, in his profession as a solicitor, the libel, as set out in the declaration, was contained in a letter written by the defendant to Messrs. Wright and Co. bankers at Nottingham, and charged the plaintiff with improper conduct in the management of their concerns. It appeared, however, upon the trial, that the letter was intended as a confidential communication to those gentlemen, and that the defendant himself was *interested* in the affairs which he supposed to be mismanaged by the plaintiff. After the cause had been opened by the plaintiff's counsel,

Lord Ellenborough, C. J. said, if the letter had been written by the defendant confidentially, and under *an impression that its statements were*

plaintiff's wife, either from anxiety to know whether she was legally the wife of the plaintiff, or whether he had another wife living when he married her, though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable; but in such a case it is necessary for the defendant who published the libel, to show that he published it under such authority, and with such a view. The jury are, therefore, first to say, whether the advertisement imputes a charge of bigamy to the plaintiff, and if they think it does, then to inquire whether the libel was published with a view, by the wife, of fairly finding out a fact respecting her husband, in which she was materially interested. If it was so, the publication is not a libel, and the defendant is entitled to a verdict." The jury found a verdict for the defendant.

(n) *M<sup>r</sup> Dougall v. Claridge*, 1 Camp. C. 267.

*well founded*, he was clearly of opinion that no action could be maintained. It was impossible to say that the defendant had maliciously published a libel to aggrieve the plaintiff, if he was acting *bonâ fide* with a view to the *interests of himself* and the persons whom he addressed; and if a communication of this sort, which was not meant to go beyond those immediately *interested* in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted. His Lordship referred to the case of *Cleaver v. Sarraude*, tried on the northern circuit while he was at the bar: where, in an action like the present, it appeared that the letter had been written confidentially to the Bishop of Durham, who employed the plaintiff, as steward to his estates, to inform him of certain supposed malpractices on the part of the plaintiff; upon which the judge, who presided, declared himself of opinion that the action was not maintainable, as the defendant had been acting *bonâ fide*, and the nonsuit which he directed, had been acquiesced in from a conviction entertained by the plaintiff's counsel of its being founded in law.

The Attorney-general, for the defendant, said, that his client, at the time of writing the letter, was certainly impressed with a belief of the truth of the charges it contained, but had since seen



reason to believe they were groundless ; he therefore consented to withdraw a juror.

So, where the person *to whom* the communication is made is interested, as in the case of *Cleaver v. Sarraude* above quoted, no action is maintainable without proof of express malice.

In the case of *Dunman v. Bigg (o)*, the plaintiff was a dealer in beer, buying it of a brewer, and selling it to publicans. Wishing to open an account with the defendant, a brewer, one Leigh became his surety for the price of such quantities of beer as should, from time to time, be supplied to him, the defendant promising to inform Leigh of any default in his payments made by the plaintiff.

After the parties had dealt together for some time, the defendant went to Leigh, and spoke to him in very opprobrious terms of the plaintiff, saying, that he wished to cheat him, that he had sent back, as unmerchantable, beer which he himself had adulterated, that he was a rogue and a rascal, &c. At this period there was a sum of money due from the plaintiff to the defendant in respect of the beer, for which Leigh had given a guarantee. Lord Ellenborough, C. J. said, "I am inclined to think that this was a privileged communication. Had the defendant gone to any

(o) Sittings in London after T. T. 48 G. 3. Camp. R. 260.

other man, and uttered these words of the plaintiff, they certainly would have been actionable; but Leigh, to whom they were addressed, was guarantee for the plaintiff, and the defendant had promised to acquaint him when any arrears were due. He therefore had a right to state to Leigh what he really thought of the plaintiff's conduct in their mutual dealings; and even if the representations which he made were intemperate and unfounded, still, if he really believed them at the time, he cannot be said to have acted maliciously, and with an intent to defame the plaintiff. To be sure, he could not lawfully, under *colour and pretence* of a confidential communication, destroy the plaintiff's character, and injure his credit, but it must have the most dangerous effects if the communications of business are to be beset with actions of slander. In this case the defendant seems to have been betrayed by passion into some unwarrantable expressions; I will therefore not nonsuit the plaintiff, and it will be for the jury to say, whether these expressions were used with a malicious intention of defaming the plaintiff, or with good faith to communicate facts to the surety which he was interested to know (*p*).

(*p*) The parties agreed to withdraw a juror.—For further illustrations of this division of the subject, see *R. v. Enes*,

It must, however, be remarked, that in all these cases, where the occasion is sufficient to raise the question of actual malice, the doctrine must be understood with this limitation, viz. that the times and mode of the publication are suited to the occasion. For it seems to be clear, that whether the occasion and circumstances supply an absolute or merely a qualified justification, dependent on the question of actual malice, they do not extend to justify any publication which is not warranted by the occasion and circumstances.

Andr. 229. Lord Mordington's case, *R. v. Jenneaur*, 3 Bac. Abr. 452. and *R. v. Bailey*, Andr. 229. So it was held that the owner of a public house could not maintain an action against a neighbouring publican, for giving a bad character of such house to a person who, being in treaty for purchasing it, applied to the defendant for information, provided (as is stated) there is some evidence, though slight of the truth of the assertion. *Humber v. Ainge*. Abbott, L. C. J. West. 13 Feb. 1819. Manning's Index. tit. Libel, pl. 13. In the case of *Wilson v. Stephenson*, 2 Price, 282. where the defendant had stated that the plaintiff had murdered his, the plaintiff's brother, the plaintiff having, in fact, been the innocent occasion of his brother's death; and the defence was, that the words had been spoken in the way of admonition, and the jury found that the words were not spoken maliciously, which was recorded as a verdict for the defendant, the court refused to disturb the verdict. See further as to words spoken by way of admonition or advice. 2 Brownl. 151, 152. 2 Burn's Ecc. Law, 179. 3 Bac. Ab. 412.

In the instance of a brief to counsel, for instance, the publication as between the attorney and counsel may not be libellous, and yet, were it to be printed and published, there might be a libel in every line. Where the defendant who had acted as solicitor to a commission against Brown, upon a petition to the chancellor to supersede the commission, published an address to the creditors in a public newspaper, charging the bankrupt with having committed a gross fraud against his creditors, and calling on the latter to resist the proceedings, Lord Ellenborough held that as the communication might have been made in a manner less injurious, it was to that extent libellous (q).

(q) *Brown v. Croome*, 2 Starkie's C. 297. His lordship observed, that if the publication in question had merely suggested doubts, without alleging the facts, as in the case of *Delaney v. Jones*, the main grievance would have been wanting. If it could be shewn, that an advertisement in the Gloucester paper was the only possible means of communicating notice of the circumstances, it might be sufficient to vindicate the mode; one person could have no right to take measures for his own benefit to the injury of another. The argument which had been used was ingenious, but the defendant made no progress in his defence, unless he could shew that such a publication was the only effectual mode of convening the creditors. The want of proper caution had rendered the publication actionable, as being published to the world at large; this made an essential distinction, which applied to all the

cases; in the instance of a brief to counsel, for instance, the publication as between the attorney and counsel might not be libellous, and yet if it were to be printed and published, there might be a libel in every line. Every unauthorised publication, to the detriment of another, was, in point of law, to be considered as malicious.

## CHAPTER XIV.

*Repetition of Slander invented by another.*

THE doctrine of justification, on the ground that the defendant has done no more than repeat the scandal which he has heard from another, though of ancient date, rests on principles so dubious and has been so limited in its modern application, that it seems to be doubtful whether in any case such a justification would be permitted to prevail as an absolute and peremptory defence, without reference to other circumstances, and the actual intention of the publisher.

And for this reason it has been deemed to be more proper to rank this species of defence with those which are of a qualified nature, and which depend, for their consummation, on the absence of express malice, than to class it with those where the very occasion and circumstances furnish an absolute and peremptory bar, independently of the question of intention.

The doctrine of justification by hearsay was expressly recognized in Lord Northampton's

case (a), which was, upon an information in the Star Chamber, for scandalum magnatum. The resolution contained in that case has a plain reference to the rule contained in the statute 1 Westminster, which enacts, that the propagator of slander, concerning the grantees of the realm, shall be imprisoned *until he give up the author*. The resolution was, "if A. say to B. 'Did you not hear that C. was guilty of treason?'" This is tantamount to a scandalous publication. And, in a private action for slander of a common person, if J. S. publish that he hath heard J. N. say, that J. G. was a traitor or thief, in an action on the case, if the truth be so, he may justify; but if J. S. publish that he hath heard generally, *without a certain author*, that J. G. was a traitor or thief, there an action *sur le case* lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any, but against himself, who published the words, although that in truth he might hear them, for otherwise this might tend to the great slander of an innocent person; for, if one who hath *lesam phantasiam*, or who is a drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to repeat them generally, without mentioning the author,

that would give greater colour and probability that they were true, in respect of the credit of the repeater, than if the author himself should be mentioned (b)."

In *Crawford v. Middleton* (c), it was held, that it was necessary for the plaintiff to negative the fact of the defendant's having heard the words, which he pretended to repeat as spoken by another. But in the case of *Woolnoth v. Meadows* (d), where a similar objection was taken, it was said by the court, that Lord Northampton's case was a complete answer to it.

As the consideration of the indemnity consists in the giving the plaintiff a certain cause of action against the author, or at least against a prior propagator of the slander, if the disclosure made fall short of supplying a certain cause of action, it will not avail as a justification.

The defendant (e) speaking to the plaintiff, who was a tailor, said, "I heard you were run away." The defendant pleaded, that before the speaking of the words, he had heard and been told, by one D. Morris, that the plaintiff had run away, for which reason he spoke the words.

(b) The court referred to 33 and 34 Ed. 1. and 30 Ass. pl. 10. in the Exchequer. Mich. 18 Ed. 1. Rot. 4.

(c) 1 Lev. 82.

(d) 5 East, 463.

(e) *Davis v. Lewis*, 7 T. R. 17.



Lord Kenyon, C. J. in giving judgment for the plaintiff on demurrer, said, "Whether this be considered on the authorities, or on the reason of the case, the justification cannot be supported. The Earl of Northampton's case is precisely in point. If a person say, that such a particular man, naming him, told him a certain slander, and that man, in fact, did tell him so, it is a good defence to an action to be brought by the person of whom the slander was spoken; but if he assert that slander generally, and without adding who told it him, it is actionable. Then it is said, it is sufficient to repel such action, to disclose, by the defendant's plea, the person who told him that slander; but that is clearly no justification; after putting the plaintiff to the expense of bringing the action, he can only impute the slander to the person who utters it, if the latter do not mention the person from whom he heard it. The justice of the case also falls in with the decisions on the subject. It is just, that when a person repeats any slander against another, he should, at the same time, declare from whom he heard it, in order that the party injured may sue the author of the slander.

So (*f*), where the defendant said of the plaintiff, who had been proposed as a volunteer for

(*f*) *Woolnoth v. Meadows*, 5 East, 463.

the defence of the country, " His (the plaintiff's) character is infamous, he would be disgraceful to any society. Whoever proposed him must have intended it as an insult. I will pursue him, and hunt him from all society. If his name is enrolled in the Royal Academy, I will cause it to be erased, and will not leave a stone unturned to publish his shame and infamy. Delicacy forbids me from bringing a direct charge, but it was a male child of nine years old who complained to me." The defendant justified, averring that a male child of the name of A. B., of the age stated, did complain to the defendant of an unnatural crime before that time committed by the plaintiff upon such male child. Upon demurrer, it was observed by the court, that slanderous words can in no case be justified upon the report of another, unless the name of the original slanderer be given at the time; that it is not sufficient to disclose the name for the first time in the defendant's plea; that the object of the rule is to give the injured person *a certain cause of action against some one*. But that, in the principal case, no action could have been maintained on those words against the boy; whereas, if the defendant had named the boy at the time, and repeated truly what he had said to him, the plaintiff would have had his action against the boy.

And for the same reason, the repeater of slander must give the very words used by the author; for the plaintiff, to maintain his action, must state the very words used by the defendant, and prove them as stated; so that, unless the defendant faithfully repeat the original slander, the plaintiff will not be put in possession of a certain cause of action.

The defendant (*g*), in a written affidavit, deposed to words spoken by a third person concerning the plaintiffs, who were merchants; and, after stating the words used by the third person, added, "or words to that purport and effect." The defendants justified, stating, that they did hear the third person publicly declare to the effect following; and then proceeded to state the communication deposed to, on which the action had been brought. To this justification the plaintiff demurred upon several grounds; and the court, in giving judgment for the plaintiffs, observed, that "at all events, in order to justify the parties reviving the slander by naming the original author of it, they must so disclose the matter as to give the plaintiff a certain cause of action against the party named. Now here they only state that the other uttered such words, or *to that effect*; and if the defendants, when called as witnesses to support the action against the author, could only prove

that he uttered words to *the effect* of those set forth, that would not be sufficient."

In Maitland and others (i) against Goldney and others, one ground of the plaintiff's action, as stated in the declaration, was, that the defendants had published the slander of another, well knowing that other to have retracted his opinion of the plaintiffs, and to have confessed his error. Upon demurrer, it was not argued for the defendants that an action does not lie for publishing slander originally uttered by another, after knowledge by the defendant that it was untrue, but an objection was taken to the mode of pleading.

In giving judgment on demurrer, it was observed by Lord Ellenborough, C. J. that "In order to maintain this species of action, it is necessary that there should be *malice* in the defendant, and an *injury* to the plaintiff, and that the words should be untrue. By the first count, the charge in substance against the defendants is, that they revived and published an injurious report of the plaintiff which had been made by another person, who was afterwards convinced that he had uttered the words hastily and rashly, and that the defendants did this with a full knowledge of all those circumstances. All the several allegations of the previous reports; the subsequent

(i) 2 East, 425.

explanation of the plaintiff's conduct to Guy (*k*), his satisfaction with it, and the defendant's knowledge of it, are so interwoven by the pleading with the publication of the libel, that they could not be severed from it; so that the plaintiffs could not sustain that count by proof of the publication alone, without such explanatory circumstances. The plaintiffs could not entitle themselves to recover unless all were proved. The count then contains a charge against the defendant, that they published the slander with a *knowledge* that the person who had originally uttered it was satisfied that it was untrue. The fact, therefore, of such previous uttering, was merely used by the defendants as a *pretence* for publishing the same slander, that shews *malice* in the defendants, and an *injury* to the plaintiffs." Judgment was, however, given for the plaintiffs, not on the ground of legal malice being attributable to the defendants, but because they had repeated the *effect of the slander*, and not the very words.

In the case of *Gerrard v. Dickenson* (*l*), it was held, that slander spoken by the defendant against his own knowledge, made him liable at all events, and deprived him of the benefit of his justification.

In the case of *McGregor v. Thwaites* (*m*), it

(*k*) The author of the slander.

(*l*) 4 Coke, 18. b.

(*m*) 3 B. and C. 24.

was held, that where offensive, but not actionable words, spoken by one person, were written and then published by another, it was no defence to an action against the latter for a libel, that the publication revealed the name of the author, for as the original words were not actionable, as spoken, the defendant had not afforded the plaintiff any cause of action against any other person; and, therefore, as the words, when reduced to writing, were clearly libellous and actionable, and no action could be maintained against any one but the defendant, he was necessarily responsible.

And in the case of *Lewis v. Walter* (n), the defendant pleaded that the alleged libel was originally published in the Hants Journal by S. H. M. and W. H.; that the defendant, at the time of his publishing the alleged libel, did also publish that the supposed libellous matter was copied and quoted from the said last-mentioned public paper (The Hants Journal), and that the said S. H. M. and W. H., had made and delivered an affidavit, pursuant to the statute, making oath that they were the publishers of the last mentioned paper. This plea was held to be bad (on demurrer) on the ground that the defendant had not disclosed the names of the publishers of the original paper at the time when he published the libel.

(n) 4 B. and A. 605.

And, it was held that, admitting that such a defence could be pleaded in bar at all, it could only be in a case where the defendant had originally given up the author by name, and where the name is sufficient to identify the party. The court, however, intimated considerable doubts whether Lord Northampton's case extended to justify any repetition of slander, except on a fair and reasonable occasion.

Although it be true that the principal authority for the doctrine of justification by hearsay, is the extrajudicial resolution in Lord Northampton's case, yet the statutes of scandalum magnatum afford a strong reason for supposing that this was once the general law of the land. Those statutes have been regarded as declaratory of the common law, and it seems to be clear, from their language, that in all cases within their scope, the propagator of scandalum magnatum, was to be imprisoned no longer than until he should have discovered the author of the scandal (o). Now, if such were the law, even where the slander affected men of the highest rank and dignity in the realm, it is not very easy to suppose that a stricter rule would be applied where the slander affected subjects of inferior degree and consequence.

(o) Supra. 176.

If the question be still open to consideration, there can be little doubt in what way it ought to be decided in point of principle.

It is difficult to carry the doctrine of exculpation from hearsay further than this, that one who *bonâ fide* repeats scandal, which he has heard from the mouth of another, for the purpose of enabling an innocent party who has been calumniated, to take measures for redressing the grievance, shall not be liable to an action. It is obvious, that if a man malevolently give a wide circulation to slander, under the mere colour and pretence of rendering friendly aid and assistance to the party calumniated, he stands in no situation which entitles him to legal protection; and consequently, as the act is in its own nature injurious, there is nothing to exempt him from the ordinary rule, which obliges the propagator of a scandalous report, attended with actual or presumptive damage, to make compensation (*p*).

Were such a justification to be an absolute and peremptory bar to the action, it might be in the power of any two ill-disposed persons to slander a third with impunity. If A. were to impute felony or any other crime to M., in the presence of B., and B. were to impute the same offence to

(*p*) See Mr. Borthwick's Observations, Law of Libel, p. 291, 297.



M. in the presence of A., and each were then to publish generally that he had heard such slander reported by the other, M. would be without remedy against either ; if he brought his action against A., then A. would prove, that he did in fact hear the charge from B. ; if he sued B. a similar defence would also succeed.

## CHAPTER XV.

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### *Of the Process and Pleadings.*

**NEXT** are to be considered the means appointed by law for obtaining such damages where the party is entitled to them ; and the means of defence where a party sues who is not so entitled.

The division of these proceedings is naturally suggested by the order in which they occur in point of time, and consist of the process, pleadings, trial, judgment, and writs of error ; to which may be added, the writ of prohibition.

*Of the Process.*—The action to recover damages for slander, whether oral or written, is an action on the case ; in which, since the damages are uncertain, the party cannot be held to bail without a special order of the court, or of a judge, on a full affidavit of the circumstances (a), and no instance appears in the books in which such an order, in a common case, has been granted. Even in an action of scandalum magnatum, the

(a) 1-Tidd. P. 150. ed. 4.

court has denied an application for good bail ; in the Marquis of Dorchester's case (b) the defendant agreed to put in bail to the amount of £50.

In the Earl of Macclesfield's case (c), the plaintiff desired that the defendant might put in special bail ; but the court would not grant it, and said, it was a discretionary thing, and not to be demanded of right.

And it seems that the court will, in no case, allow special bail, unless affidavit be made of the words spoken (d).

It is next to be considered what there is peculiar to the pleadings in an action for slander: Observations upon the declaration relate to the venue, the parties, the averments, and the joinder of different counts.

First, to the Venue.—In general, the venue in an action of this nature may be changed upon the usual affidavit, where that affidavit can be made with propriety. But where (e) a libel, written or printed in one county, is circulated in others, the court will not change the venue to the first ; for, as every publication is a fresh offence, the de-

(b) 2 Mod. 215.

(c) 3 Mod. 41.

(d) 3 Mod. 41.

(e) *Hoskins v. Ridgway*, H. 23 G. 3. K. B. *Pinkney v. Collins*, 1 T. R. 571. 1 Wils. 178. 1 T. R. 647.

defendant cannot swear that the cause of action was confined to any one county (*f*).

But where a libel is written in one place, and sent to another in the same county, the court will change the venue (*g*) if it be laid in a different county.

So, where the libel is written in one county and published in Germany, the defendant may change the venue, upon an affidavit that the cause of action arose in that county, and not elsewhere in this kingdom (*h*)

And in the case of *Freeman v. Norris* (*i*), the distinction was recognized between libels dispersed throughout the kingdom and those which are published in one county only.

So that, where the libel is printed in one county and published in a second, the venue, if laid in the second, cannot be changed ; for the publication in the latter county, is the act of the defendant, and he cannot make the usual affidavit (*k*).

But the court will otherwise change the venue where special ground is laid.

(*f*) *Clissold v. Clissold*, 1 T. R. 647. 1 Wils. 178. The court refused to change the venue from London to Worcester, an affidavit being made that the letter was written at Stafford, because it bore the post-mark of that place ; the putting the letter into the post-office, at Stafford, being *prima facie* evidence that it was written there. *Hitchon v. Best*, 1 B. & B. 299.

(*g*) *Freeman v. Norris*, 3 T. R. 306.

(*h*) 3 T. R. 652. *Metcalf v. Markham*.

(*i*) 3 T. R. 306.

(*k*) *Hitchon v. Best*, 1 B. & B. 299.

As if the defendant cannot have a fair trial in the original county (*k*).

But in an action for *scandalum magnatum*, it seems the venue cannot be changed upon the usual affidavit ; and the reason assigned is, that the scandal raised of a peer of the realm reflects upon him throughout the kingdom (*l*).

In the case of Lord Shaftesbury above alluded to, the venue was changed on the ground that the defendant could not have a fair trial in London where the venue is laid.

In the Marquis of Dorchester's case (*m*), on a motion to change the venue, which had been laid in London, Pemberton, Serj. shewed cause against the motion.

1st. Because the king was a party to the suit ; for it is,

2dly. Because the plaintiff was a lord of parliament, where his services would be required. North, C. J. was of opinion that the venue could not be changed, as the proceeding was in the nature of an information. But Atkins, J. inclined to think that the venue might be changed ; but the court not agreeing, the defendant consented that the cause should be tried in London, and the venue was not changed.

(*k*) Lord Shaftesbury's case, 1 Vent. 364.

(*l*) Gil. C. P. 90.

(*m*) 2 Mod. 216.

But it seems that generally, unless special ground be laid for changing it, the plaintiff in scandalum magnatum may retain his venue ( $\pi$ ).

Formerly, in actions for slander as well as in others, where a local justification was pleaded, the courts observed great nicety in requiring the venue to be awarded, not only from the county, but the very place in which the justification, as stated in the plea, arose. The reasons for this were, indeed, frequently stronger in these actions than in other instances, since where the truth of a criminal charge is pleaded in justification, the issue partakes of the nature of a criminal process ; and it is said, that, upon its being found against the plaintiff, he is liable to be tried by a petty jury without further inquest.

In the case of *Ford v. Brooke* ( $\phi$ ), which was an action for calling the plaintiff a perjured person at D. in Essex ; the defendant justified, averring that the defendant had perjured himself at Westminster, in the county of Middlesex ; the plaintiff replied, *de injuriâ*, &c. and the court awarded the venire to be directed to the sheriff of Middlesex.

So, in an action for calling the plaintiff a thief, at Dale, in Essex, the defendant pleaded that the plaintiff had committed a robbery at Sale, in the

( $\pi$ ) *Duke of Norfolk v. Anderton*, 2 Salk. 668. 1 Lev. 56. 307. 1 Vent. 364.

( $\phi$ ) Cro. Eliz. 261.

same county ; and issue being joined upon that fact, the court awarded the venire from Sale (*p*). And a misdirection of the venire was a good ground for arresting or setting aside the judgment, though the court would, in such case, award a new venire. But the law upon this point is altered by the statutes 16 & 17 C. 2. c. 8. and 4 Ann. c. 16. s. 6. ; the former of which enacts that, after verdict, no judgment shall be arrested or reversed, for that there is no right venue, so as the cause of action were tried by a jury of the proper county or place where the action was laid : and the latter directs that the venire shall be awarded out of the body of the county where such issue is triable (*q*).

In *Craft v. Boite* (*r*), the words were, “ Look, there is a thievish young rogue, he hath stolen £200. worth of plate out of Wadham College.” (meaning Wadham College, in the university of Oxford). The plaintiff brought his action in London ; the defendant justified the words, because he said that the plaintiff at Oxford, in the county of Oxford, stole certain plate out of Wadham College ; the plaintiff pleaded *de injuriâ*, &c. ; and the issue was tried in London, where the plaintiff had a verdict with £50. damages.

(*p*) *Clerk v. James*, Cro. Eliz. 870. See also Bowyer's case, Cro. Eliz.

(*q*) See Serj. Williams's note, 2 Saund. 5.

(*r*) 1 Saund. 241.

Saunders, for the plaintiff, moved in arrest of judgment, on the ground of the mistrial, but the court (against the opinion of Twisden) conceived that the fault was cured by the statute which had lately passed (*s*). And this, which appears to have been the first decision under the act, has since been acquiesced in.

*Next, as to the Parties.*

First, as to the number of plaintiffs. In this species of action, as well as in other cases of tort, two or more may join where their joint interest has been affected by the act of the defendant (*t*). So that, where a libel reflects upon two partners in their trade, they may join in the action (*u*). But unless a joint interest be affected, several actions should be brought, though the same words be spoken or libel published concerning two. Thus, where A. says to B. and C., "You have murdered D.," B. and C. must bring several actions, not a joint one (*x*). So it seems,

(*s*) 16 & 17 C. 2.

(*t*) *Weller v. Baker*, 2 Wils. 423. 2 Williams's Saund. 116.  
a. n. 2.

(*u*) *Maitland v. Goldney*, 2 East, 425. 3 Bos. and Pull. 150. *Cook v. Batchelor*, Shepp. Ac. 53. *Foster v. Lawson*, 3 Bingh. 452.

(*x*) *Smith v. Croker*, Cro. Car. 512. 28 H. 8. fol. 19.  
*Dyer*, Shepp. Ac. 53. *Deacon's case*.



that two joint-tenants or coparceners may join in an action of slander of their title to the estate : for, as it must be shewn in the declaration, and proved, that the plaintiffs received some particular damage, by reason of the slander, the damage, even as well as their interest in the estate, is joint (y).

So, for the words A. *or* B. murdered D., either A. or B. may bring a separate action (z), but they cannot maintain a joint one (a). Where (b) joint actionable words are spoken of a husband and wife, the tort is several, and the husband alone may bring the action ; but the wife may, in such case, be joined, provided the injury be laid as done to herself.

The case of words spoken of the wife admits of three varieties ;

1st. Where the words are not actionable, but are attended with special damage.

2dly. Actionable *without* special damage.

3dly. Actionable *with* special damage.

In the first case, the damage resulting to the husband is the sole ground of action, and the wife must *not* be joined. As, where the action is brought for calling the wife a bawd, *per quod*

(y) 2 Will. Saund. 117. a.

(z) 10 Mod. 198.

(a) 1 Roll. Abr. 81.

(b) *Smith v. Croker*, Cro. Car. 512.

the husband lost his customers (*c*). And to join the wife in such case would be bad on demurrer, in arrest of judgment, or in error (*d*).

But secondly, where the words are actionable, and no special damage is laid, the wife *must* be joined, and the declaration must conclude *ad damnum ipsorum*, for there the action survives; and she must be joined (*e*) in an action for any slander published of her before her marriage.

But thirdly, where the words spoken of the wife are actionable, and special damage has accrued in consequence to the husband, great perplexity has arisen on the question whether the wife should be joined or omitted. The difficulty, in this case, proceeds from the circumstance of two distinct causes of action being involved in one and the same transaction,—the actionable words spoken of the wife, and the special damage resulting to the husband. For the former, the husband is not entitled to damages without making his wife a party, and the cause of action survives to her. In the latter case, the loss is several, and peculiar to the husband, and ought not, therefore, to be stated as the loss of both. Accordingly, where the husband has brought the

(*c*) 1 Lev. 140. B. N. P. 7.

(*d*) *Grove v. Hart*, Tr. 35 G. 2. B. N. P. 7.

(*e*) 3 T. R. 627. 631. Com. Dig. Bar. and Fem. 1 Sid. 387. Ld. Ray. 1208. Roll. Ab. 347.

action alone, it has been contended that he ought to have joined his wife in respect of the actionable words spoken of her, that at all events the action would survive to her, and therefore that the defendant would twice make compensation for the same injury. And in similar cases, when the wife has been joined, it has been argued that the joint action was improper, since the special damage accrued.

From a review of the decisions upon this point, it appears, that the wife *is not barred* by the husband's action, though the special damage result from actionable words spoken of the wife, which removes the objection to a separate action, in which he alone is entitled to recover damages. In *Guy v. Livesay* (*f*), the husband alone recovered in an action of trespass for a personal injury to himself, and also for beating his wife, by means of which he lost her society for three days. And on motion in arrest of judgment, the court held, that the action was well brought; for the action was not brought *in respect of the harm done to the femme*, but for the particular loss of the husband, for that he lost the company of his wife, which was only a damage and loss to himself, for which he should have the action, as a master should have for the loss of his servant's service,

(*f*) Cro. Jac. 501.

In *Young v. Pridd* (g), the plaintiff brought trespass, for that the defendant assaulted, ill treated, and carried away his wife, and detained her for half a year, by means of which he lost the comfort and society which he should otherwise have had with his said wife. After verdict and judgment for the plaintiff, error was brought in the Exchequer Chamber, and assigned that the husband had brought the action for the battery of the wife, which he could not do without his wife, and had recovered damages for the battery, and therefore that the judgment was erroneous. But all the justices and barons held, that the husband in that action *did not recover damages for the battery* of his wife, but for the loss which he had in wanting her company. That the *per quod consortium amisit* and abduction of her were one entire conjoined cause of action, for which the damages were given. That for the battery, true it was that the wife ought to have joined to recover damages, and that the verdict and judgment *did not bar the wife from an action*, after the death of her husband, for the battery, or that she might join with her husband in an another action. And judgment was affirmed.

(g) Cro. Car. 89.

A A

In the case of *Smith v. Hixon* (h), it was held that the husband alone might maintain an action for the malicious prosecution of the wife, by means of which he was put to expense. After verdict for the plaintiff, upon motion in arrest of judgment, grounded on the omission of the wife, the court said, that though the remedy for the scandal might survive to the wife, it was no objection to the husband's action, and that he might undoubtedly proceed for the battery of the wife, *per quod consortium amisit*, and yet the action for the beating would survive to the wife.

From these cases it appears, that the husband may separately maintain an action for the damage resulting to himself, from a personal injury offered to the wife, for which personal injury they might have maintained a joint action, and that the right of action would survive to the wife for the independent injury done to herself. The case of actionable words spoken of the wife, producing special damage to the husband, seems to be, in all respects, perfectly analogous to those cited; and on their authority it may be concluded, that a husband, for such words, or rather for the damage resulting from them, may sue without his

(h) Str. 977. See also *Hyde v. Seyssor*, 8 Mod. 26. Cro. J. 538. Fort. 377. Cro. J. 664.

wife. And it seems to be highly reasonable that the husband, in respect of the special damage, should be entitled to a separate action. In case the words had not been intrinsically actionable, the husband must have sued alone ; and it can scarcely be contended that the injurious quality of the words can compel him to alter the nature of the proceeding, to recover for the separate tort to himself, the only alteration in the case consisting in the additional mischief to the wife. As the injuries are completely distinct, there seems no reason why the remedies should not be equally independent. A contrary supposition would involve this absurdity, that by the increased virulence of the words, the plaintiff would be placed in a worse situation as to his remedy, since, in case of actionable words, his title to damages would become dependent upon the life of his wife, and would be extinguished by her dying before judgment recovered.

Where, on the contrary, the words spoken of the wife are intrinsically actionable, the husband is not entitled to recover in a joint action, in respect of any mere consequential damage to himself. In such a case, therefore, where the husband and wife join, it would be improper to allege such consequential damage. The error, however, would be aided by a special verdict, which excluded the consequential damage and

confined the damages to the detriment sustained by the wife (i).

*Next, as to the Joinder of several Defendants.*

Where the wrongful act is the joint act of two or more, the plaintiff may proceed against them in one and the same action; as, where the slander is contained in affidavits made by two,

(i) 2 Mod. 66. 1 Lev. 3. 2 Lev. 101. Com. Dig. Pleader, C. 87. In the case of *Russell v. Corne*. 1 Salk. 119. Holt, R. 699. 6 Mod. 127. The husband and wife brought trespass and false imprisonment for the imprisonment of the wife, by means of which the domestic affairs of the husband remained undone, to the damage of both. After verdict for the plaintiff, it was moved, in arrest of judgment, that the business of the husband remaining undone, could not be to the damage of the wife, and that for such damage, the husband ought to have brought the action alone. But it was answered, that the action being well brought and conceived for the imprisonment, what came under the *per quod* could only be taken in aggravation, as if words in themselves actionable be spoken of a wife, and the husband and wife bring the action, and conclude *per quod*, &c. the husband lost his customers, it would be well, for the words being in themselves actionable, the *per quod* should be taken in aggravation, all which the court allowed.

But Lee, C. J. is reported to have said (Str. 1094), " In a manuscript note which I have seen of this case in Salkeld, Holt, C. J. says, ' I will not intend that the judge suffered the husband's business remaining undone to be given in evidence.' "

but so connected as to form one slanderous charge (*k*).

But where two persons speak the same words, the plaintiff must bring separate actions, for the acts are several in their nature, and the tort of one is not the tort of the other.

The defendants said to the plaintiff (*l*), "Thou hast the plate of J. S., and we charge thee with that felony." After verdict for the plaintiff, in an action against both, judgment was arrested. And the case of an action for mere slander differs in this respect from an action for charging a plaintiff with felony, and procuring him to be indicted ; for, in the latter, the act of the defendants may be joint, and the plaintiff may proceed against them in the same action (*m*).

Though the husband and wife speak the same words, the plaintiff must bring different actions, and the court will not permit them to be consolidated, for it would be error to join the wife for words spoken by the husband only, and the declaration (*n*) would be ill either upon demurrer or in arrest of judgment.

But where, in an action against husband and wife for speaking of the plaintiff certain scanda-

(*k*) 2 East, 426. (*l*) Cro. Jac. 647. (*m*) B. N. P. 5.

(*n*) *Swithen and his Wife v. Vincent and his Wife*, 2 Wils. 227. *Subly v. Mott*, B. N. P. 5.



lous words, the jury found the husband guilty, and the wife not guilty, the plaintiff had judgment; for though the action ought not to have been brought against both, and the declaration would have been held ill on demurrer, yet the verdict cures the error (*o*)

Counts for oral and written slander may be joined in the same declaration (*p*), so a count for slander may be joined with one for a malicious prosecution (*q*).

### *Of the Averments.*

THE declaration in this, as well as in every other action, consists of a clear and technical statement of the facts necessary to support the complainant's suit; so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, by the court who are to give judgment upon them (*r*), and that the parties may afterwards avail themselves of the judgment (*s*).

(*o*) 1 Roll. Abr. 781. (*o*) pl. 1. Sty. 349. Com. Dig. Pleader, c. 87.

(*p*) *King v. Waring*, 5 Esp. C. 13.

(*q*) *Manning v. Fitzherbert*, Cro. Car. 271.

(*r*) Cowp. 682. Com. Dig. Pleader, C. P. 17. Co. Litt. 383. 2 B. & P. 267.

(*s*) 3 M. & S. 116.

It has been at all times the fashion to preface the legal enunciation of the plaintiff's case with a preliminary panegyric upon his character ; this is superfluous, since it does not affect the gist and essence of the action. A man of bad character is not to be represented as worse than he really is, and therefore is entitled to a compensation, to be measured by the excess of the scandal beyond what is really due to him. In one instance (*t*), indeed, it appears that the plaintiff's announcing himself to be of *good fame*, tempted the defendant to plead, that at the time of publishing the words the plaintiff was not of good fame ; but the plea was held to be bad, since it answered matter of inducement which did not require any answer.

In a modern case, the plaintiff, in an action for a libel, imputing to him seditious principles, prefaced his declaration with a boast of the uniform loyalty of his conduct ; it appeared that he had been some time in confinement under the sentence of the court, for publishing a seditious libel ; and the Lord Chief Justice (*u*) animadverted on the impropriety and absurdity of such a preamble.

The allegations relate to the act of publication,

(*t*) Strachey's case, Sty. 118.

(*u*) Lord Ellenborough, C. J.

the matter published, the *application* of the matter published, the  *motive* in publishing, and to the  *damage* occasioned by it.

First, as to the act of publication.

This is either of a libel, or of oral slander.

In the case of a libel, it appears that a publication in effect must be stated, though no particular form of words is required. In the case of *Baldwin v. Elphinstone* (x), it was assigned for error, that in the second count the defendant was charged with having *printed* the libel, and having *caused* it to be printed in the St. James's Chronicle, but was not charged with having *published* it. After argument in the Exchequer Chamber, the Justices and Barons were all of opinion that the judgment ought to be affirmed. That there are various modes of publication, and *no technical words are necessary* to describe it; that it is sufficient if there be stated in the declaration such matter as amounts to a publication without using the formal term published, and the jury are upon the evidence to decide whether a publication be sufficiently proved or not. That printing a libel may be an innocent act, but unless qualified by circumstances, shall *prima facie* be understood to be a publishing: it must be delivered to the compositor and other subordinate workmen. That

(x) 2 Bl. R. 1037.

printing in a *newspaper* admits no doubt upon the face of it. The court further observed, " It is stated that he caused to be printed. This confirms the fact of publication, because it calls in a third person as agent, to whom the libel must have been communicated. In short, the count does not state generally, as it might have done, that the libel was published, but it expresses the particular mode of publication, viz. in a newspaper. It thereby puts the publication in issue, and the jury have found it so."

It must be observed, that this was after verdict, which was relied upon by the court, and probably the declaration would have been considered to be defective upon special demurrer, for not stating a publication in more explicit terms.

In this case, too, great stress was laid upon the circumstance that the defendant had caused the libel to be printed in a *newspaper*; had the allegation been simply, that the defendant printed and caused to be printed the libel in question, it would have been difficult to have construed it into an averment that he published, for a man may print, and therefore cause to be printed, without the aid or privity of others.

The term *published* is the proper and technical term to be used in the case of libel, without reference to the precise degree in which the defendant has been instrumental to such publication ;

since, if he has intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to shew a publication by him (y).

In a declaration for words spoken, it is sufficient to aver that the defendant spoke the words in the presence (z) of divers persons, without alleging that those present either heard or understood them, and it will be intended that they did hear and understand the words till the contrary appear.

But it would be insufficient to aver that the words were spoken, without stating them to have been spoken in the presence of some one (a), or without some averment which necessarily implied a publication to a third person, as that the defendant *palam et publicè* (b) *promulgavit de querente*.

It has been doubted whether it be sufficient to lay the words to have been spoken under a *cumque etiam*, by way of recital (c); but in the case of *Mors v. Thacker* (d), it was decided, that such an allegation in an action on the case is

(y) Lamb's case, 9 Rep.

(z) Cro. E. 480. Noy, 57. Golds. 119. Cro. J. 39. Cro. Car. 199.

(a) Sty. 70.

(b) Cro. Eliz. 861.

(c) 2 Mod. 41.

(d) 2 Lev. 193.

good, though (as was said) it would be otherwise in trespass.

If the words be spoken in a foreign language, an averment is necessary to shew that the hearers understood them (e); and even where Welsh words were averred to have been spoken in Monmouthshire, which once was part of Wales, judgment was arrested after verdict for the plaintiff, because it was not averred that they were spoken before Welshmen, or those who understood the Welsh tongue (f).

In the *King v. Brereton* (g), the indictment stated, that the defendant “*Scripsit fecit et publicavit, seu scribi fecit et publicari causavit.*” And judgment was arrested on account of the uncertainty of the disjunctive charge; and in a civil proceeding such an averment would probably be considered defective, if pointed out by a special demurrer.

Next as to the publication of the *illegal matter*.

The words are either intrinsically actionable, or they derive their illegality from collateral circumstances; it is therefore necessary to inquire, in the first place, how the mere words themselves are to be stated and connected with the plaintiff; and secondly, where they are not

(e) Cro. E. 496. Cro. E. 865.

(f) Cro. Eliz. 865.

(g) 8 Mod. 328.

in themselves actionable, how they are to be connected with the collateral facts from which their actionable quality is derived.

First, as to the statement of the mere words ; it has long been settled, that the declaration or indictment must profess to set out the very words published, and that it is not sufficient to describe them by their sense, substance, and effect.

It seems (*h*) formerly to have been held to be sufficient to set out the words, not in English, as they were delivered, but in the Latin language ; the permitting which clearly recognized the propriety of a substantial, in contradistinction to an actual and precise statement of the very expressions used, since in many instances it would be impossible to render the expressions used into Latin ones perfectly synonymous.

And it appears (*i*) to have been the opinion of Holt, C. J. in Dr. Drake's case, that the libel might have been set forth in the information in Latin, in which case a variance, which did not change the sense, would not vitiate it.

(*h*) See Hugh Pyne's case, Cro. Car. 117, which was submitted to all the judges for their opinion, when many indictments for uttering traitorous and seditious words were cited, in many of which nothing more than the Latin translation was set out.

(*i*) Holt, R. 351.

No argument can, however, be drawn from this source, in support of a substantial, in opposition to a precise statement, the doctrine having been virtually overruled; for if it was sufficient to set out a Latin translation whilst the proceedings were drawn in Latin, it would, on the same principle, after the passing of the statutes (*k*) which direct the English to be substituted for the Latin language in all legal proceedings, have been sufficient to set out a libel published in French or Italian merely by an English translation. But in the case of *Zenobio v. Axtell* (*l*), judgment was arrested, because a libel published in French had not been set out in the original language, but was merely described by way of translation. And Lord Kenyon, C. J. upon that occasion observed, that from the uniform current of proceedings, it appeared that the original words should be set forth with an English translation, showing their application to the plaintiff.

In the case of the *Queen v. Dr. Drake* (*m*), Holt, C. J. is reported to have said, "A libel may be described either by the *sense* or by the *words*; but by the Chief Justice's application of this doctrine, it appears that he did not mean that a mere description of the words by their

(*k*) 2 G. 2. c. 2. and 6 G. 2. c. 14.

(*l*) 6 T. R. 162.

(*m*) 3 Salk. 224. Holt, R. 347. 349. 350. 425. 11 Mod. 95.



*effect* would be sufficient ; for he observes, " A libel may be described either by the sense or by the words of it, and therefore an information, charging that the defendant made a writing containing such words, is good, and in that case a nice exactness is not required, because it is only a description of the sense and substance of the libel ; and if the jury find some omissions, it will be sufficient if *some words be proved*." The latter expression, "if some words be proved," clearly evinces that the very words, and not merely their effect, were to be set out ; and that his lordship meant to say, not that it is unnecessary to state the words, but that they may be stated two ways, either by their *tenor*, in which case the pleader undertakes to set out the words with the greatest precision, and the libel given in evidence must agree exactly with the one set out in the information, or by stating that the defendant made a writing containing *inter alia* the words set out, in which case it would be necessary to set out those only which are material, and a variance would not be fatal, unless the sense were altered.

In the case of *Newton v. Stubbs* (n), the action was brought for words spoken, which were set out in the declaration *ad tenorem et effectum se-*

(n) 3 Mod. 71.

*quantum;*” and after verdict for the plaintiff, judgment was arrested, because it was not expressly alleged that the defendant spoke the very words.

In the case of the *King v. Bear* (o), the indictment was for composing, writing, making, and collecting several libels in *uno quorum continetur inter alia juxta tenorem et ad effectum sequentem*, and the words were then set out.

And it was agreed that *ad effectum* would of itself have been bad, since the court must judge of the words *themselves*, and not of the construction the prosecutor puts upon them, but that the words *juxta tenorem sequentem* import the very words themselves (o). And it was held, that the words “*ad effectum*” were loose and useless words ; but that the words *juxta tenorem* being of a more certain and strict signification, the force of the latter was not hurt by the former, according to the maxim “*utile per inutile non vitiatur.*”

In the same case (p), that of *Ford v. Bennett* was referred to, where, in a special action upon the case against *Bennett and others*, the plaintiff declared that the defendants, at Saltasbe, procured a false and scandalous libel against the plaintiff to be written under the form of a petition, and the

(o) 2 Salk. 417.

(p) 1 Lord Ray. 415.

libel was set forth after the words *continetur ad tenorem et ad effectum sequentem*. Two were found guilty, upon which judgment was entered for the plaintiff, and afterwards, upon error brought in the Exchequer, the judgment was affirmed, the exception taken to the words *ad effectum* having been overruled without consideration. And Holt, C. J. said, that he then thought the judgment to be given with too great precipitation ; but he afterwards, upon great consideration, had esteemed it to be very good law. And the *King v. Fuller* (q), and the *King v. Young* (r) were cited as authorities in point ; and the whole court were of opinion, that, notwithstanding the exception, the indictment was good ; but that if it had been only *ad effectum sequentem*, it had been ill, - because it had not imported that the words were *the specific words* which were in the libel.

In the above case of the *Queen v. Drake* (s), a distinction was taken between an action for libel and one for words, and that in the latter case it would be sufficient to find the substance. But in case of words spoken, as well as written, it has been held to be necessary to set out the words

(q) Mich. 4 W. & M.

(r) Mich. 4 W. & M.

(s) Holt, R. 348. 350.

themselves, and that it is insufficient to aver that the defendant spoke these words *vel his similia* (t).

In Dr. Sacheverell's case, the defendant having been impeached for preaching several sermons, the question arose, whether the objectionable parts ought not to have been set out on the face of the impeachment; and it was proposed to all the judges, whether, by the law of England and constant practice in all prosecutions by indictment or information, for crimes and misdemeanors, by writing or speaking, the particular words supposed to be criminal must not be expressly specified in such indictment or information; and the judges present unanimously answered the whole of this proposition in the affirmative (u).

In the case of *Cooke v. Cox* (x), it was held,

(t) Cro. J. 159. 1 Vin. Ab. 533. pl. 1. Br. Ac. sur. le cas. pl. 112. 4 Ed. 6. 4 T. R. 217.

(u) 9 St. Tr. 9 Ann. But the Lords, notwithstanding this opinion of the judges, resolved, that they would determine the impeachment according to the law of the land, and the law and usage of parliament; and that, according to the law and usage of parliament, it was not necessary in prosecutions by impeachment for high crimes and misdemeanors, by speaking or writing, to specify the particular words supposed to be criminal.

(x) 3 M. & S. 110. So in *Wood v. Brown*, 6 Taunt. 169. it was held, that to allege that the defendant had published a

that a count which alleged that the defendant had falsely and maliciously charged and asserted, and accused the plaintiff (a tradesman) of being in bad and insolvent circumstances, was bad in arrest of judgment ; and the court came to this decision, upon a review of all the former authorities, and relied particularly on the opinion given by the judges, in *Sacheverell's case*. And the court intimated, that there was no difference in this respect, between criminal cases and civil ones, where the action arises *ex delicto*. And again, in *Wright v. Clements* (y), where the declaration stated, that the defendant published a libel, containing false and scandalous matter concerning the plaintiff, *in substance as follows*; and then set out the libel with innuendos, the judgment, after a verdict for the plaintiff, was arrested.

Where the words have been spoken, or libel published in a foreign language, they must be set out in the original language, or the declaration will be bad in arrest of judgment (z). But,

libel, purporting that the plaintiff's beer was of bad quality, was bad on demurrer.

It was observed, by the court, in the case of *Cooke v. Cox*, above cited, that what was supposed to have been said by Lord Hardwicke, in *Nelson v. Dixie*, Cas. temp. Hardw. 105. was founded in a mistake.

(y) 3 B. & A. 503.

(z) *Zenobio v. Artell*, 6 T. R. 162. 3 M. & S. 116. But

it seems, that an English translation ought to be added;

It is next to be considered with what degree of particularity and certainty the words or libel must be averred.

First, in the case of oral slander.

It has been said (*a*), that the strictness formerly observed as to proving the words precisely as laid, has been abandoned, and that it is sufficient to prove the substance of them ; but, at the present day, it seems to be requisite to prove some of the words, though not all, *as they are laid*, even in the case of oral slander.

If the slander (*b*) be contained in words of interrogation, it must be so laid, and must not be averred to have been spoken affirmatively.

In the case of the *Lady Radcliffe v. Shubly* (*c*),

in an anonymous case, Hobart, 126. the plaintiff declared against the defendant for calling him *Idoner* in the Welsh tongue, and had judgment, although he did not aver that the word amounted to a charge of forgery ; and the case was cited, in which the plaintiff had judgment for the words, "Thou art a healer of felons," without any averment how the words were taken ; because the court were informed, and took notice that in some counties the term *healer* was understood to mean a smotherer or coverer of felons.

(*a*) B. N. P. 5. cites 2 Roll. Ab. 18. a. *Avarillo v. Rogers*, T. T. 1773.

(*b*) 2 East, 434. 8 T. R. 150. 4 T. R. 217.

(*c*) Cro. Eliz. 224. But see Dyer, 75.

the words laid in the declaration were, "She is as very a thiefe as any that robbeth by the highway side." The jury found that the defendant spoke these words, "She is a *worse* thiefe than any that robbeth by the highway side." And Wray, C. J. was of opinion, that "as very a thief," and "a worse thief," are all one; but Gawdy and Fenner, justices, ruled that the words did not agree with the declaration.

So, an indictment for speaking these words of a magistrate (*d*), "He is a broken down justice," is not satisfied by evidence of the words, "You are a broken down justice." Lord Kenyon, indeed, in this case, held at nisi prius, that it was sufficient to prove the *substance of the words stated*, and the defendant was found guilty; but the point was reserved, in order that a verdict of acquittal might be entered, in case the court should be of a different opinion. On motion to that effect, Buller, J. said, that there was a case in *Strange*, in support of his lordship's opinion, but that it had since been overruled in Lord Mansfield's time, and that he himself had known a variety of nonsuits on the same objection; and judgment was given for the defendant.

(*d*) *R. v. Berry*, 4 T. R. 217. *Blisset v. Johnson*, Cro. Eliz. 503, contra.

So, where A. (e) says of B. and C. "You have committed such an offence," though B. and C. may have separate actions, each must state the words to have been spoken of both.

So, where the words are spoken (f) ironically, they must be stated as spoken, with an averment that they were spoken ironically.

Where the declaration stated these words of the plaintiff, "He stole a sheep of his," (innuendo of the defendant) it was moved in arrest of judgment, that *his* must refer to the last antecedent, and so that the words were repugnant, for a man cannot steal his own sheep (g); but the objection was overruled.

Upon the authority, however, of more recent cases, it seems the variance between the words *his*, as used in the declaration, and *mine*, as proved in evidence, would be a ground of nonsuit.

Where the words laid in the declaration, as spoken of a surveyor, were, "Harrison is a scoundrel, if I would have found him an oven for nothing, and given him after the rate of £20. per cent. upon the amount of the charges for work and materials, he would have passed my account."

(e) Cro. Car. 512.

(f) 11 Mod. 86.

(g) 8 Mod. 30.



The first witness called for the plaintiff proved these words : " Harrison is a scoundrel, and if I had allowed £20. per cent. he would have passed my account." The second witness proved the words, " Harrison is a scoundrel, and if I had deducted £20. per cent. he would have passed my account."

Lord Ellenborough, C. J. said, that words to be actionable, should be unequivocally so, and be *proved as laid* ; but that, as the words were proved, they did not support the declaration. The words of the declaration were, " If he would give me £20. per cent." that might mean something to himself, by which he would be himself benefited to the prejudice of his employer, but the words proved were, " If he would allow," or " if he would deduct £20. per cent." These words might import an allowance or deduction from the plaintiff's bill for the benefit of his employer, and were of a different meaning and import."

Where the words alleged in the declaration were, " This is my umbrella; he stole it from my back door," and the words proved were, " *It is my umbrella, &c.*" and it appeared that the words were not spoken in the house where the umbrella then was, it was held, that the variance was fatal; for the words, as laid, imported to have been spoken concerning a thing *present*, those proved

were spoken concerning a thing not present at the time (i).

Where the words were spoken in answer to a question, and the injurious meaning is to be collected not merely from the terms of the answer, but from the question and answer together, the words must not be laid as a substantive and affirmative proposition, but according to the fact (k). If the defendant has not made an assertion as his own, but has merely alleged that some other person had reported the fact, it must be so averred, and if it were to be averred substantively that the defendant had reported the fact, the variance would be fatal (l); for the charge is different, and open to a different defence. Where the declaration laid the words as follows, "A.'s wife is a great thief, and ought to have been transported years ago;" and the words proved were, "A.'s wife is a bad one, and ought, &c." it was held, that the words were mis-described; the words laid imputed an act, those proved, suspicion only (m).

A variance may consist either in the *addition* or *omission* of one or more words, or in the *substitution* of one word for another. First, in the addition.

(i) *Walters v. Mace*, 2 B. & A. 756.

(k) See *Bromage v. Prosser*, 4 B. & C. 247.

(l) *Bell v. Byrne*, 13 East, 554.

(m) *Hancock v. Winter*, 2 M. & S. 502.

It is not necessary, in case of oral slander, to prove all the words, provided such of them be proved as are material.

The plaintiff declared that the defendant said of him, "He is a maintainer of thieves, and a strong thief." The jury found the whole to have been said except the word *strong*, and it was adjudged for the plaintiff (*n*).

And even where special damage is the gist of the action, it is sufficient to show that the loss was sustained in consequence of any of the words laid in the declaration (*o*).

But if all the words, as laid, constitute but one charge, the whole must be proved.

The declaration stated that the defendant said of the plaintiff, "He is selling his coals at one shilling a bushel, to pocket the money, and become a bankrupt to cheat his creditors." Upon the trial, the words "and become a bankrupt," were not proved, and the plaintiff was nonsuited (*p*).

And the reason applies with equal force in the case of libel, where the addition of a word not proved would be fatal, if it at all affected the sense, whether the words were set out under an *inter alia* or *ad tenorem*.

With respect to variances from omission, it

(*n*) *Burgis's case*, Dyer, 75.

(*o*) 2 Esp. C. 491

(*p*) *Flower v. Pedley*, 2 Esp. C. 491.

seems, in case of oral slander, to be sufficient to set *out the words which are material*, and it is not even necessary to state words which may qualify the objectionable ones; and in the case of libel, it may be averred in *uno quorum continetur inter alia, &c. (q)*; for, if something else were added, which did in fact qualify the objectionable words, it may be given in evidence on not guilty (*r*).

In Sir J. Sydenham's case (*s*), an action was brought for these words: "If Sir John Sydenham might have his will, he would kill all the true subjects of England, and the king too; and he is a maintainer of papistry and rebellious persons." The defendant pleaded, that he spake other words, *absque hoc*, that he spake these. The jury find that he spoke these words: "*I think, in my conscience*, if Sir John Sydenham," &c. and found all the other words verbatim, and conclude *si super totam materiam*, he spake the words *formâ quâ* the plaintiff declared, they find for the plaintiff to his damage of 160 marks, if otherwise, for the defendant. And three of the judges, Montague, C. J. Croke, and Dodderidge, J. held, that the plaintiff was entitled to judgment, since the other words found were not

(q) *R. v. Brereton*, 8 Mod. 328.

(r) 8 Mod. 329.

(s) Cro. J. 407.

words of extenuation or alteration of the sense of the former words, but rather enforced them, and that there was no cause to stay the plaintiff's judgment.

“ For, though the plaintiff declared of fewer words than the plaintiff spoke, yet, he declaring truly that the defendant spoke those words, upon the evidence, it appears, that he spoke those words which were actionable, and the words added diminish not, nor are an alteration of the sense of the words whereof he declares; wherefore, although the issue be specially found, yet, the plaintiff shall have judgment.”

The fourth judge (Houghton), was of opinion, that the omission of part of the words proved, though the sense was unaltered, was a fatal variance.

A writ of error was afterwards brought upon their judgment, and one ground of error assigned was the variance between the words alleged and those proved; and of this opinion were, Hobart, C. J. of the Common Bench, Winch, and Denham; but, Tanfield, C. B. Warburton, Bromley, and Hulton, were of a contrary opinion, whereupon the judgment was affirmed (t).

With respect to the stating of libels, as a copy must be set out, which in proof is to be

compared with the original, it seems to be clear that any variance in the mode of setting it out, which in any way altered the sense, would be fatal; and that although the mere mis-spelling of a single word would not be material, provided it was not altered into another word of a different meaning; yet that any variance, either from omission or addition, which affected the meaning, would also be fatal.

For, if the libel alleged vary from that which is proved, in any material respect, they cannot be identical, and the cause of action alleged cannot be the same with that proved.

The general rule will be best illustrated by actual decisions.

Bell averred, that Byrne printed and published, in the Morning Post, the following libel concerning the plaintiff, as purporting to be a letter written from A. to R. O'Conner.—“I have sold all my property to B., yet it may still go on in my name, and the rents are to be transmitted to H. Bell, Esq. Charter-House Square. Mr. Bell (meaning the plaintiff), has been for some time past confined in England, on a charge of high treason.” Upon the trial, it appeared, that the paragraph in question had been published by the defendant in his newspaper, of the 15th of May, 1810, and that it purported to be a statement of a speech delivered by the Attorney-General for

Ireland, in the Irish House of Commons, on the 19th of Feb. 1799, in the course of which several letters were read by him. The defendant objected that the words "Mr. Bell has been for some time past confined in England, on a charge of high treason," did not constitute part of the letter alleged to have been read by the Attorney-General, but were published as mere comment by him after reading the letter, and were therefore improperly described in the declaration, as purporting to be part of the letter. And the court of King's Bench, upon a motion to set aside the verdict for the plaintiff, and enter a nonsuit, were of opinion that the misdescription was fatal, and that the defendant should have been described as professing to publish a speech of the Attorney-General, for Ireland, in which was contained, &c. (u)

Where the libel given in evidence was contained in a book published respecting Mr. Cobbett, by the defendant, called "The Book of Wonders," and was as follows: Many well intentioned persons have expressed their surprise that the "Enlightener" should have been willing to accept of a seat in corruption's den, purchased with the bank notes of a man whose "incapability and baseness" he had so powerfully exposed. To convince such persons that this line of con-

(u) *Bell v. Byrne*, 13 East, 554.

duct was strictly patriotic, we have only to assure them, that in so doing he was walking in the footsteps of that "venerable veteran," whose "creed" is the criterion of excellence" (see No. 195), and who, in an article of that creed, has laid it down as a maxim, "that we must, in fighting the enemy, not reject the use of even despicable and detestable men," Cobbett, v. 32, p. 82. The libel, as set forth in the declaration, omitted the words "(see No. 195)," and the words "Cobbett, v. 32, p. 82." It was held that the variance was fatal; for, upon reading the declaration, the libel would be understood to mean, that the defendant had himself made the assertions respecting the plaintiff, but, when the libel is produced, it appears, from the references which it contains, that the paragraph was written with intent to expose the conduct, not of the plaintiff, but of another person (x).

One count of a declaration stated the words of a libel as follows: "My sarcastic friend, by leaving out the chorus or repetition of Monsieur T.'s poem, greatly injures the *tout ensemble*, or general and combined effect." The words proved in evidence were: "My sarcastic friend ΜΩΡΟΣ, by leaving out" &c., and it was held by Lord Ellenborough, L. C. J., upon the trial of the

(x) *Cartwright v. Wright*, 5 B. & A. 615.



cause that there was a material variance between the libel declared on in that count and the libel proved (y).

Where a declaration, in stating a libellous paragraph, imputing to the plaintiff that he had formerly a house in P., and some time prior to that he had one in M., in both *of which* he continued, omitted the words *of which*, it was held that the variance was fatal (z).

But it is by no means necessary, even in case of libel, to set out the whole of the obnoxious publication ; it is sufficient to extract the obnoxious passages, provided their sense be clear and distinct (a).

It is not even necessary to set out another part of the publication to which the libellous passage refers, provided the part which is set out be in itself distinct and intelligible (b).

But where distinct passages are extracted from the same libel and set out in the declaration, care should be taken to distinguish them, as by prefacing them with the words, in a certain part of which said libel there was and is contained, &c. setting out the passage, and in a certain other

(y) *Tabart v. Tipper*, 1 Camp. C. 350.

(z) *Cooke v. Smyth, M<sup>c</sup>Clell, and Young*, 250.

(a) *R. v. Brereton*, 8 Mod. 329. Cro. 645. *Sidnam v. Mayo*, 1 Roll. R. 429. Cro. J. 407.

(b) *Buckingham v. Murray*, 1 C. & P. 46.

part of which said libel there was and is contained, &c. ; for if the facts were to be set out continuously, and the sense were thereby to be altered, the variance would be fatal (*c*).

With respect to the alteration of one or more letters of a word, the rule seems to be, that if the sense be thereby altered the variance will be fatal, but not otherwise (*d*).

With respect to the mis-spelling of a word, provided the sense be not altered, the variance is not material, even in an indictment for perjury. In the case of the *King v. Birch* (*e*), a variance was relied upon in favour of the prisoner between the indictment for perjury and the affidavit on which the prosecution was founded. In the affidavit, the defendant swore that he *understood* and believed, &c. The assignment of perjury in the indictment was, that he had falsely sworn that he *undertood* and believed, &c. omitting the letter *s*.

Lord Mansfield—"This is an application for a new trial in an indictment for perjury, upon

(*c*) *Tabart v. Tipper*, 1 Camp. 350; and see *Sidnam v. Mayo*, 1 Roll. R. 429. Cro. J. 407. and quære, whether if the passages set out purported to be continuous passages, when, in fact, they were extracted from various parts of the publication, the variance would not be fatal. *Cooke v. Hughes*, 1 Ry. & M. 112.

(*d*) 3 Salk. 224.

(*e*) Leach, C. C. L. 158.

the ground of a material variance between the affidavit and the indictment, the letter *s* being left out in the word understood. We have looked into all the cases on the subject, some of which go to a great length of nicety indeed, particularly the case in Hutton, where the word *indicari* was written for *indictari*, but that case is shaken by the doctrine laid down in Hawkins (*f*).

“ The true distinction seems to be taken in the *Queen v. Drake* (*g*), which is this ; that where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material (*h*).”

If the omission, even of a letter, render a word of a different signification from that contained in the libel, the variance it seems will be fatal (*i*).

As when the word *not* was stated instead of *nor*; for, it was said, if, in such a case, a letter could be amended, why not a word, why not a sentence ? and where would the *non ultra* be found, that this was not so small a variance of a letter as in false spelling or abbreviations, as if *gaine* instead of *gain*, where the word and sense would be the same ; but that, in the principal

(*f*) 2 Hawk. Pl. C. c. 46. s. 190.

(*g*) Salk. 660.

(*h*). See Hart's case, Leach, C. C. L. 172. Douglas, 194. Starkie on Evidence, tit. Variance.

(*i*) 3 Salk. 224.

case the words were different and of different significations ; different parts of speech, the one an adverb, the other a conjunction ; the one positive, the other relative. It was observed, too, that though the objection was in appearance trivial, the consequences were weighty, and that if the variance were not considered as fatal, the judges would have too great power in cases of treason, where the decision would be quoted as a precedent.

Next as to the application of the matter published.—Where the expressions used are actionable, either in themselves, or by reason of consequential damage, without reference to any extrinsic circumstances, it is sufficient to shew merely their application to the plaintiff.

This is effected by means of a colloquium, or some express averment, that the words were spoken of and concerning the plaintiff, and an innuendo, in stating the words themselves, that he was the person meant (*k*).

Formerly it was the practice to aver, that the defendant spoke the words in a certain discourse which he had with others, or with the plaintiff himself in the presence of others, concerning the plaintiff. This was technically called laying a col-

(*k*) The nature and office of an innuendo will afterwards be more particularly considered.

loquium, and till the case of *Smith v. Ward* (l), it seems to have been doubted whether a declaration without a colloquium would be good. In that case, it was alleged that the defendant said of the plaintiff, "He (innuendo the plaintiff) is a thief;" and the court, on being informed that it was the common course to declare that he said *de præfato querente hæc verba*, held it to be sufficient without a colloquium.

But though the custom was to lay a colloquium, it was always held to be necessary to aver that the words were spoken concerning the plaintiff.

Where actionable words are spoken to a plaintiff, it is sufficient to lay a colloquium with him without an express averment that the words were spoken *de querente*; for it cannot but be intended that the words were spoken to him with whom the conversation is alleged to have been had (m).

But where actionable words are spoken in the third person, as, "He is a thief;" though a colloquium of the plaintiff be laid, it is necessary to aver that the words were spoken concerning the plaintiff (n).

And it is not sufficient, in such case, to con-

(l) Cro. Jac. 673. 3 Salk. 328. Sir T. Ray. 85.

(m) Roll. Ab. 85. pl. 8. 1 Will. Saun. 242. (a) n. 3.

(n) Roll. Ab. 85. l. 30. 1 Sid. 62. 1 Com. Dig. tit. Defam. G. 7.

nect the words with the plaintiff by means of an innuendo (*o*).

But where a colloquium is laid, and there is an innuendo of the plaintiff, it seems that the want of a direct averment must be pointed out by special demurrer, and that it will be intended after verdict, or upon general demurrer, that the words were spoken of the plaintiff; but where no communication is laid concerning the plaintiff, the omission of such an averment (*p*) is fatal to the declaration.

Where the person slandered is pointed out by the prefatory words thy son, thy brother, &c. or my son, my brother, which description may possibly apply to several, it seems, from the current of decisions, that the plaintiff must aver that he stood in the described relation, and that he was the son or the brother of the person addressed in the former case, or of the speaker in the latter, and that a general allegation that the words were spoken of and concerning the plaintiff is insufficient (*q*).

Where the words were, "Go, tell my landlord (innuendo the plaintiff) he is a thief (*r*)."

(*o*) Cro. J. 126.

(*p*) Roll. R. 244. *Skutt v. Hawkins*, 1 Will. Saun. 242, a. n. 3.

(*q*) 1 Roll. 84. l. 15. 30. 50. 85. l. 45. Cro. Car. 443. Jon. 376. Cro. Eliz. 416, even after verdict.

(*r*) Cro. Car. 420.

ment was given against the plaintiff, for not having averred that he was the landlord of the defendant, although he had averred that the words were spoken of himself. And it is not sufficient to bring the plaintiff within the description by means of an innuendo (s).

And even where the description could by possibility apply to one person only, it has been held that an averment is necessary, to shew that it was applied to him.

The plaintiff declared that the defendant having a discourse concerning the plaintiff with divers other persons, said these words of the plaintiff, " Your father (meaning the plaintiff) hath struck and killed Nicholas Russell." And after verdict for the plaintiff, judgment was arrested, because it was not averred that the plaintiff was father to him to whom the words were spoken (t).

In *Shalmer v. Foster* (u), the declaration stated, that " the wife of the defendant spake of the aforesaid plaintiff to Ann Rochester, the plaintiff's mother, these words, " Where is that lying thief, thy sonne, &c." And it was moved in arrest of judgment, that the words were uncertain, no precedent communication being alleged to be of

(s) *Delamere v. Heskins*, Hill. 11 Car. K. B. 1 Vin. Abr. 528.

(t) Hil. 1652. Rot. 1037. 1 Vin. Ab. 530. Golds. 187. Cro. Eliz. 416. 439. Cro. Car. 92. 173. Mo. 365.

(u) Cro. Car. 177. But see Cro. J. 107.

the plaintiff, nor that he was the only son of the said Ann Rochester, to whom the words were spoken, and that it might be that she had divers sons, and every of them might have an action as well as the plaintiff, and that there was an ambiguity who was meant by the words. And Whitelock and Croke were of that opinion; and the latter cited the cases of Harvey and Chamberlain (*x*), and of Burnet and Codman (*y*), where for such words it was adjudged for the defendant. But Hyde, C. J. and Jones, J. doubted thereof, because it was alleged that she spoke of the plaintiff, and was found guilty. But it was answered, that so were the words in every declaration, and that so it was in the precedents cited (*z*).

At this day, after so many of the technical niceties, with which actions of this description were formerly encumbered, have been defeated, it may well be well doubted whether much attention would be paid to these cases. The real end and object of such averments is, to shew with certainty that the plaintiff is the person aimed at by the defendant; and though, upon the face of the words themselves, their application may be ambiguous, as where the defendant says, thy son, or thy brother, yet there appears no want of certainty upon the record, when it is alleged that

(*x*) E. T. 20 J. 1.

(*y*) T. T. 5 J. 1.

(*z*) The court adjourned.



the words were spoken *of the plaintiff*; and whether they were so applied or not, is a matter of evidence, to be proved by shewing that he did stand in the relation specified, without due proof of which the jury could not possibly find the truth of the averment that the words were spoken concerning him.

Considering, however, the great number of express decisions upon this subject, it would not be prudent to omit a special averment. Thus if the words were, " He who lives at No. 1, Doubtful Place, is a receiver of stolen goods, it would be proper that the plaintiff, being the person meant, should allege that he lived at No. 1, Doubtful Place, when the words were spoken, and not only to aver that the words were spoken of him, but also to allege specifically that they were spoken in reference to the house in which he so lived.

Where the description may apply to several persons, as brothers or sons, it is unnecessary for the plaintiff to aver, that he was the only brother or only son, so as to make it appear that the description applied to himself exclusively. This objection, however, appears to have been frequently taken; and in *Wiseman v. Wiseman*<sup>(a)</sup>, where the defendant spoke the words *de prefato querente existente fratre suo naturali*, on motion in arrest of judgment, it was held by Yelverton,

(a) Cro. J. 107.

J. that the words were too uncertain ; that words, to be actionable, ought to import in themselves precise slander without ambiguity, so that every one who heard them might intend of whom they were spoken ; for otherwise, if it could be helped by the averment of the plaintiff, every one who was his brother might make the same averment, and have an action which would not be reasonable. But it was afterwards adjudged, by all the judges, for the plaintiff.

A distinction was taken in the last case by Tanfield, J. between words importing in themselves apparent uncertainty, and those which might be ascertained by intendment. That, in the first case, no averment would aid the uncertainty, but that, in the latter, it might be aided by an averment and verdict ; and therefore, if the words had been " one of my brothers is perjured," there would be in them an apparent uncertainty ; and that, although one of the brothers should bring the action, and aver that they were spoken of him, yet that because it appeared to the court that there were divers brethren, and that it did not appear to any of whom he spake, no action would lie, although the defendant should be found guilty by verdict.

But it has since been held (b), that for disjunctive words, as that A. *or* B. committed such a felony, both A. and B. are entitled to recover,

(b) *Harrison v. Thornborough*, 10 Mod. 196.

and it would probably now be decided upon the same principle, that in the case put by the learned Judge, each brother would be allowed to maintain his action.

When the plaintiff's name is mentioned, though a further description be given (*c*), the general averment is sufficient, without a special allegation that such further description applied to the plaintiff. As, where the speaking is alleged to be of the plaintiff, and the words are stated, "T. (innuendo the plaintiff) is thy brother, &c." it is sufficient without any other averment.

In *Nelson v. Smith* (*d*), the words were, "Captain Nelson is a rogue and a thief, and hath stolen away my goods;" and it was held, that the declaration was good without any averment that he was a captain, or known by that name, inasmuch as there was a communication of the plaintiff, and it was averred that the words were spoken of him.

The general rule is, that where the party can shew that he was intended by the defendant, he may maintain an action, whatever be the mode of description.

Thus, for the words, "The parson of Dale is a thief;" it was held that he who was parson of

(*c*) Cro. Eliz. 429.

(*d*) 22 C. J. B. R. See also *Osborne v. Brookes*, 1 Vin. Ab. 529. 1 Roll. Ab. 85.

Dale at the time the words were spoken might maintain an action (e).

The defendant said, "That murderous knave Stoughton lay in wait to murder me;" and the action brought by Thomas Stoughton was held to be maintainable (f)

But, in the next place, whenever the actionable quality of the publication arises from circumstances *extrinsic* of the words themselves, averments are necessary to shew that such circumstances exist, and to connect the words with those circumstances.

Thus, if the words were—"He was concerned in the late affair at B.'s house." The words unexplained would not bear any actionable construction; but if they were spoken with reference to a burglary lately committed, or supposed to have been committed, at B.'s house, and it was intended to impute to the plaintiff a participation in the crime, they would become actionable. But in order to shew their actionable quality on the face of the record, it would be essential to allege the facts, and next to shew that the words were spoken, or libel published, in reference to those facts.

The technical mode of effecting this, is, first, to state, in the introductory part of the declara-

(e) 3 Bulst. 326.

(f) Sheppard, Action of Slander, 59.

tion, those special circumstances, in reference to which the publication is actionable.

Secondly, To shew generally, by means of proper averments, that the words, or libel, were published of and concerning the facts and circumstances so previously alleged.

Thirdly, To connect the words, or libel, set out with such previous facts by means of proper innuendos.

By this process such extrinsic facts are incorporated, as it were, with the defendant's publication, and a complete slanderous charge appears on the face of the record.

In what cases it may be necessary to state prefatory circumstances, to be afterwards connected with the publication by means of a colloquium and innuendos, is of course a matter in which the pleader must exercise his discretion in the particular instance before him; the only general rule that can be laid down is, that such circumstances must be introduced upon the record, as will enable the court to decide upon the actionable quality of the publication, and the jury to find the facts which are connected with it.

It may be laid down as a general rule, that where *the slanderous charge or imputation can be collected from the words themselves, it is unnecessary to make any averment as to circumstances, to whose supposed existence the words*

*refer.* For the slander, which is the ground of proceeding, appearing on the very face of the publication, it is a matter of indifference as to the cause of action, whether the circumstances referred to really existed, or were invented by the defendant.

Thus, when a person says of another (*g*), "That is the man who killed my husband," no averment of the husband's death is necessary, for the defendant's words have ascertained the death.

The defendant said to the plaintiff (*h*), "Thou hast given J. S. £9, for forswearing himself in chancery, and hast hired him to forge a bond." After verdict for the plaintiff, it was moved, in arrest of judgment, that the declaration contained no allegation that any suit was in chancery, or that J. S. forswore himself in his answer, or as a witness, or that the plaintiff suborned J. S. to forswear himself, or shew any particular wherein he forswore himself. But it was held that these averments were immaterial; for if J. S. never was sworn, it was scandalous in the defendant to say that the plaintiff procured J. S. to forswear himself in a court of record, although it was merely false, because he never was sworn. And that as to the bond, though it was not said that J. S. had forged a bond, the charge against the plaintiff was nevertheless scandalous.

(*g*) *Button v. Heywood and his Wife*, 8 Mod. 24. Vent, 117.

(*h*) *Cro. Car.* 337.

In an action for these words (*i*), "Thou hast killed thy master's cook." On motion in arrest of judgment, it was held to be unnecessary to make any averment, shewing who the plaintiff's master was, or that he was the master of the person slain, because the words in themselves imputed slander.

In *Wilner v. Hold*, the words were, "Thou art a rogue and a rascal, and hast killed thy wife." On motion in arrest of judgment, amongst other causes, it was alleged that an action lay not for the words, because it was not shewn that the wife was dead, or how she was killed; but the objections were overruled (*k*), and the plaintiff had judgment.

In declaring for the words, "I will call him in question for poisoning my aunt." There needs no averment that the aunt was poisoned (*l*).

There are, notwithstanding, many cases to be found in the books where averments of this kind have been deemed to be indispensable; but as these are contradicted by the more modern decisions (*m*), and are rather remarkable for their subtlety than for either convenience or consistency, it would be a waste of time to take fur-

(*i*) *Cooper v. Smith*, Cro. J. 423.

(*k*) See 1 Vin. Ab. 513. pl. 1, 2.

(*l*) Cro. Eliz. 569, 823.

(*m*) *Peake v. Oldham*, Cowp. 275.

ther notice of them than by citing a few specimens.

After verdict for the words, "Thou art as ar-rant a thief as any in England, (*n*) it was held, in arrest of judgment, that the words were not actionable, for want of an averment that there was any thief in England.

After verdict for the words, "Thou art a murderer, for thou art the fellow that did kill Mr. Sydnam's man," judgment was reversed, for want of an averment that any of Mr. Sydnam's men had been slain (*o*).

The words were, "Whosoever he is, that is the falsest thief and the strongest in the county of Salop, whatsoever he hath stolen, or whatsoever he hath done (*p*), Thomas Haselwood is falser than he," it was held necessary to aver that there were felons in the county of Salop. But this resolution is to be attributed to the anxiety of the courts to discourage such actions ; it seems pretty clear that at the present day no such averment would be deemed necessary.

It would be sufficient to aver that the defendant, intending to charge the plaintiff with felony, spoke the words ; and in setting them out, to add

(*n*) *Foster v. Browning*, Cro. J. 687.

(*o*) *Barrons v. Ball*, Cro. J. 331.—See a conjecture upon the original reason of this scrupulous nicety, p. 81.

(*p*) *Shepp. Ac.* 269.



an innuendo to the same effect, in which case a verdict for the plaintiff would be conclusive as to the defendant's meaning and intention.

The introduction of useless averments is in all cases objectionable, inasmuch as it encumbers the plaintiff's case upon the trial with unnecessary proof, and in some instances the superfluity may prove fatal to the declaration.

In the case of *Snag v. Gee* (q), where it appeared upon the record that the person, with whose murder the plaintiff had been charged by the defendant, was still alive ; it was held that no action was maintainable.

*And where the words of the defendant are general, no explanation is necessary to render them more particular.*

The defendant (r) charged the plaintiff with having forsworn himself in his answer to a bill in chancery. After verdict for the plaintiff, it was moved, in arrest of judgment, that the particulars of the perjury imputed were not pointed out in the declaration, and that many indictments for perjury had been quashed, for not showing the perjury-to have been in a material point. But the court held, that though indictments ought to show the cause of perjury, yet that in an action

(q) 4 Rep. 16. 1 Vin. Ab. 409. pl. 4.

(r) *Sir R. Snowe v. —*, Cro. Car. 321.

for words which is grounded on the speech of another, the charge cannot be enlarged further than the other spoke.

So, in cases where a felony is charged, it is unnecessary to make any averment, introducing any circumstances relating to a felony actually committed; so, with respect to imputations of forgery or perjury, where the meaning can be collected from the defendant's own words, no averment ought to be made as to the existence of any circumstance to which the defendant might by possibility allude, since it has been long settled that their existence is perfectly immaterial to the maintenance of the action (*s*).

But in case of a charge of forswearing, unless from the accompanying words, it be clear that a judicial forswearing was meant, the plaintiff must show upon the record that the defendant alluded to some particular forswearing which amounted to perjury. Thus, in a declaration for saying, “(*t*) A. B. being forsworn, compounded the prosecution.” No introduction of extrinsic facts is necessary, since an indictable forswearing must have been meant; but in declaring for the words (*u*), “He has forsworn himself in Leake Court,” it is necessary to show that Leake Court was one

(*s*) Vid. Supra, 85.

(*t*) Cro. Eliz. 609.

(*u*) 1 Roll. Ab. 39. pl. 7. 6 Bac. Ab. 207.

in which the offence of perjury could have been committed.

In the *King v. Horne* (x), the libel, as stated in the information, was averred to be of and concerning his said majesty's government, and the employment of his troops. The libel, as set forth in the information, advertised a subscription for "the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, and preferring death to slavery, were, for that reason only, inhumanely murdered by the King's (meaning his said majesty's) troops at or near Lexington and Concord, &c. in the province of Massachusetts." The defendant having been found guilty, objected, in arrest of judgment, that there was no averment as to the state of the Massachusetts colony at that time, or that the king had sent any troops there, or that the employment of the troops was by the king's authority.

Lord C. J. De Grey, in giving judgment, observed, "The words in the present case are, that the defendant, of and concerning the king's government and the employment of his troops, said, 'that innocent subjects had been inhumanely murdered by the king's troops, for preferring death to slavery.' Do these words import, in

(x) Cowp. 682.

their natural and obvious sense, that the king's troops were employed by the act of government inhumanly to murder the king's innocent subjects? There can be no doubt but that the king's government comprehends all the executive power both civil and military, that he employs all the national force, and that his troops are the instruments with which part of the executive government is to be carried on. The introductory part of this information charges that the subject of the writing in the present case was, 'the troops and the king's troops, and the business they had done.'

"It has been truly said, that the king's troops may, like other men, act as individuals, but they can be employed as *troops* by the act of government only. If the averment, therefore, amount to this, that in the discourse which was held, the words were said, 'of and concerning the king's government,' the natural import appears to us to be this: 'I am speaking of the king's administration, of his government relative to this troops, and I say, that our fellow subjects, faithful to the character of Englishmen, and preferring death to slavery, were, for that reason only, inhumanly murdered by the king's order, or the orders of his officers.' The motive imputed tends to aggravate the inhumanity of the act, and consequently of the imputation itself, because it

arraigns the government of a breach of public trust, in employing the means of the defence of the subject, in the destruction of the lives of those who are faithful and innocent.

“As to any other circumstances not stated in the information if those which are stated, do of themselves constitute an offence; the rest supposed by the defendant, whether true or false, would have been only matter of aggravation, and not any ingredient essential to the constitution of the crime, and therefore not necessary to be averred on the record.”

With respect to the allegation of collateral circumstances, in reference to which the publication is actionable, care should be taken not to allege them too minutely, and not to allege more than is necessary, for where the actionable quality of the publication depends wholly on its connection with collateral matter, a variance in proof of those matters has frequently been held to be fatal.

Where the words are actionable in reference to the special character of the plaintiff, as a physician, barrister, clergyman, or tradesman, a prefatory averment of such his character and situation is of course in all cases essential.

In the description of the special character in which the plaintiff sues, some nicety is to be observed, in not averring more than is necessary;

for, since the averment of character is material, the plaintiff upon the trial will be bound to prove it, with all the circumstances with which the description in the declaration is encumbered, though a much more simple one might have sufficed.

In an action for words, the plaintiff (*y*) declared that he was *in medecinis doctor* ; and it was moved in arrest of judgment, because he did not shew that he was licensed by the College of Physicians, or that he was a graduate of one of the universities according to the statute (*z*). But Bankes, C. J. and Crawley, J. were of opinion that the act was a general one, which need not be pleaded.

And even had the statute been a private one, it seems that the plaintiff in such an action would not be bound to set out his title, since, in general, in an action on the case against a wrong doer for a disturbance, it is sufficient for the plaintiff to allege his right generally, without showing a title (*a*).

And in an action brought by a physician, it is sufficient to aver (*b*) that he had used and exercised

(*y*) *Dr. Brownlow's case*, Mar. 116. pl. 3. 1 Vin. Ab. 539.

(*z*) 14 H. 8. c. 5.

(*a*) 2 Vent. 292. Cro. J. 43. 123. Com. Dig. Pleader, c. 39:

(*b*) 8 T. R. 305.

the profession of a physician ; but if he were to aver that he was a physician, and had duly taken the degree of doctor of physic, he would at all events be required to prove his degree as stated (c) ; and if he were unable to prove it, he would fail.

But though the plaintiff need not aver how he came by his title, he must describe it in apt terms. Thus, in an action brought by a barrister, he ought to aver that he is *homo consiliarius* ; and it is not sufficient to say that he is *eruditus in lege* (d).

It was formerly held, that it was necessary for a tradesman (e) to aver in an action for words of his occupation or trade, that he got his living by buying and selling ; but this arose from the idea, that the words, to be actionable, must import bankruptcy, and must be applied to a person who was liable to the statutes of bankruptcy, which has long been exploded (f) : it is sufficient to aver that the plaintiff exercised the trade, and derived profit from it.

Next it should appear that the special character

(c) 8 T. R. 303. 1 N. R. 196. 2 Bala. 230.

(d) 1 Vin. Ab. 539. pl. 2.

(e) Sid. 299. 1 Vin. Ab. 539. According to Coke, C. J. the technical description is *homo consiliarius et in jure peritus*.

(f) Vide supra, 134, 135.

belonged to the plaintiff at the time of the publication. So little precision has been required as to this statement, that it has been held that the averment by the plaintiff, that he is of such a trade, or has exercised it for divers years (*g*), without saying *ultimo et jam elapsos*, or that he is a freeman exercising the art or mystery of a linen-draper for the space of five years past, or that he has been an attorney (*h*) for divers years now elapsed, was sufficient, without an express averment that he was such at the time the words were spoken, since it is not to be presumed that a man alters his trade or profession.

In the case of *Dodd v. Robinson* (*i*), the plaintiff declared that he was inducted into a parsonage in Ireland, and executed the office of pastor for four years after. It was moved in arrest of judgment, that he did not aver that he was a parson at the time of speaking the words.

But the court said, it should be intended that he continued parson, because he had a freehold in the parsonage during his life.

In the case of *Tuthill v. Milton* (*k*), the court said, that in an action for words which affect the plaintiff in his office which he holds during plea-

(*g*) *Tuthill v. Milton*, Yel. 159. This was after verdict.

(*h*) 2 Roll. R. 84. 1 Vin. Ab. 538.

(*i*) All. 63, 64. 1 Vin. Ab. 538. note to pl. 3.

(*k*) Cro. Jac. 222. Yalverton, 159.



sure, it must be expressly averred that he was in the office at the time the words were published ; but that if the words relate to his profession or trade, it is sufficient to aver that he has for some years past exercised the profession or trade, for that it shall not be intended that he has discontinued such profession or trade.

But in the subsequent case of *Collis v. Malin* (l), where the plaintiff declared that he had, for a great while, used the trade of buying and selling cattle, and that the defendant said of him, "Thou art a bankrupt." After verdict for the plaintiff, judgment was arrested.

After verdict, indeed, if the continuance can be collected from any averment or circumstances, the want of a precise and technical allegation will be cured.

As, where the plaintiff, after alleging that he *was* a justice (m) of the peace for the county of Leicester, for divers years, averred that the defendant spake these words of him, *being a justice of the peace*.

So the continuance may be collected from the words themselves ; as if the defendant say of an attorney, that "he plays with both hands (n)."

(l) Cro. Car. 282. See also 2 Roll. 84. Dan. 170.

(m) *Beaumont v. Hastings*, Cro. J. 240.

(n) 2 Roll. 85.

It seems, in general, to be sufficient to allege generally that the plaintiff was a physician, barrister, or attorney, at the time of the alleged injury, without more.

It is unnecessary to aver that the plaintiff has qualified himself to act in the situation or office, in respect of which he is slandered, according to the enactments of any statute (*o*).

Where the words or libel derive their injurious quality from extrinsic circumstances, which are averred upon the record, it is obvious that the allegations by which the words or libel are applied to such extrinsic subject matter, become descriptive of the nature of the injury.

And, consequently, that a material variance in proof from such averments must be fatal.

Where the plaintiff stated that he was the proprietor and editor of a newspaper calumniated by the defendant, it was held to be insufficient to prove merely that he was the proprietor (*p*).

Where the declaration stated that the plaintiff was an attorney of the Court of King's Bench, and had been employed by the defendant, as his attorney, to defend an action, wherein one

(*o*) See *Hartley v. Herring*, 8 T. R. 131.

(*p*) *Heriot v. Stuart*, 4 Esp. C. 437. *Ld. Kenyon, C. J.*  
See also *Stevens v. Aldridge*, 5 Price, 234. *R. v. Shaw*,  
1 Leach, C. C. L. 79. 2 East's P. C. 580. *R. v. Ellis*,  
*Russell*, and *Ryan*, 188. *Sellers v. Till*, 4 B. & C. 655.  
But see *Lewis v. Walter*, 3 B. & C. 138. *Infra* 398.

G. W. L. had been the plaintiff, and the present defendant had been the defendant, and the words, " I have got rid of a rogue in Willey, and I have got rid of a bigger rogue in Parry (the plaintiff), were alleged to have been spoken of the plaintiff's conduct in that cause ; it was held, that as the words were laid as spoken of the plaintiff, in the conduct of a certain action, that action was the ground work of the inquiry, and that its existence ought to be proved (*q*).

In an action (*r*) for a libel on a constable, alleged in both counts of the declaration to have been published of and concerning his conduct in the apprehension of persons stealing a dead body, it was averred, in what that conduct had consisted, viz. that he had carried that body to Surgeon's Hall ; and it was held to be necessary to prove the introductory allegation, inasmuch as it was material to the defamatory character of the libel itself (*s*).

But, on the other hand, the omission to prove

(*q*) *Parry v. Collis*, 5 Esp. C. 339. And it was held, that it was not sufficient to show that the costs had been levied and paid, and that all the papers had been given up to the defendant, and that notice had been given to the defendant to produce all papers, &c. Lord Kenyon said, that he presumed that the roll had been carried in, to which the plaintiff might have had access, and given a copy in evidence.

(*r*) *Teesdale v. Clement*, 1 Chitty, 603.

(*s*) See the observations of Abbott, C. J. upon this case, 3 B. & C. 124.

facts unnecessarily alleged, will not be fatal, unless by the form and mode of pleading they have been made descriptive of that which is material.

An information alleged that the king had issued a particular proclamation, and also averred, that on occasion of that proclamation, divers addresses had been presented to his Majesty by divers of his subjects ; the information charged the defendant with a publication with the intent to bring the said proclamation into contempt, but did not refer to the addresses ; and it was held to be necessary to prove the fact, that such a proclamation had been issued (†) ; but it seems that it was unnecessary to prove that any addresses had been presented (u).

In an action on the case for exhibiting an inscription tending to defame the plaintiff as the keeper of a brothel, the declaration contained a prefatory allegation, that the plaintiff carried on business as a retailer of wines, but it was held, that proof of the fact was unnecessary, there being no colloquium of the trade (x).

And although the words or libel be alleged to have been spoken and published of and concerning subject matters previously alleged, yet a variance in the omission to prove the whole

(†) *R. v. Holt*, 5 T. R. 436.

(u) Per Buller, J. *ib.*

(x) *Spull v. Massey*, 2 Starkie, C. 559.

of such previous allegations, will not be material, provided these allegations be of a divisible nature, and those which are not proved be not material to the defamatory character of the libel itself. For the allegation is not descriptive of the words or libel, but of the nature of the injury; and if the several matters in reference to which the libel is alleged to have been published, be cumulative and divisible, so also the application of the libel to such subject matters, and the injury arising from that application may be considered to be divisible.

The declaration alleged the publication of a libel, of and concerning the plaintiff, and also of and concerning the plaintiff in his business or profession of an attorney, and the plaintiff having failed in proving that he had either taken out his certificate, or practised in the year in which the libel was published, he was in consequence nonsuited; but it was afterwards decided, by the Court of King's Bench, that the allegation was not descriptive of the libel, and consequently, that there was no material variance (y). So, where the declaration alleged that

(y) *Lewis v. Walter*, 3 B. & C. 138. But where the plaintiff alleged that he was treasurer and collector of certain tolls, and that the defendant published of him, as such treasurer and collector, "You are gathering the toll for your own pocket," thereby then and there meaning that the plaintiff, so being

the plaintiff was vestry clerk of the parish of M——s; that, whilst he was vestry clerk, certain prosecutions were carried on against B. for certain misdemeanors, and that in furtherance of such proceedings, and to bring the same to a successful issue, certain sums of money, belonging to the parishioners, were applied in discharge of the expenses; and that the defendant, to cause it to be suspected that the plaintiff had fraudulently applied money belonging to the parishioners, falsely and maliciously published of and concerning the plaintiff, and of and concerning his conduct in his office of vestry clerk, and of and concerning the matters aforesaid, a certain libel, &c. It appeared upon the trial, upon the production of the libel, that the imputation was, that the plaintiff had applied the parish money in payment of the expenses of the prosecution after it had terminated. And it was held, that the variance was unimportant; for it was immaterial to the character

such treasurer and collector, was guilty of collecting tolls for the purpose of improperly applying them to his own use; the plaintiff having proved that he was *treasurer* only, and not collector, the variance was considered fatal, and the court of K. B. refused to set aside a nonsuit. For the words were applicable to the plaintiff rather in his character of collector, than of treasurer; the plaintiff was bound to prove that the words were applicable to him, in the manner which he himself had pointed out by his innuendo. *Sellers v. Till*, 3 B. & C. 655.

of the libel, whether the money were so applied before or after the termination of the prosecution (x).

The plaintiff declared that he had been a wool-stapler at Cirencester, and that at the time when the words were spoken he was a brewer at Oxford, and that the defendant spoke of him, as such trader, these words, " Mr. H. (the plaintiff) and B. have both been bankrupts ; Mr. H. at Cirencester ;" the plaintiff proved that he was, when

(x) *May v. Brown*, 3 B. & C. 113. In the case of *Lord Churchill v. Hunt*, 2 B. & A. 685. The declaration alleged that, before the publication of the libel, a carriage, in which E. S. was riding, was passing on a certain highway, and that the plaintiff was also driving another carriage, and that it happened, without any negligence, default, or furious driving on the part of the plaintiff, that the two carriages came in contact together, whereby the carriage in which the said E. S. was riding, was accidentally overturned, and the said E. S. was injured, and that the defendant published a libel of and concerning the plaintiff, and of and concerning the said accident. The jury found, on an issue taken on a special justification to part of the alleged libels, that the accident had been occasioned by the hard and furious driving of the plaintiff, and found a verdict with £50 damages as to the other part of the libels which was not justified ; upon a motion to enter a verdict for the defendant, on all the issues, it was contended that the allegation that it happened without furious driving on the part of the plaintiff, was part of the description of the accident. But the court held that the averments were divisible, and that the allegation was no part of the description of the accident.

the words were spoken, a brewer at Oxford; but gave no evidence of his having been a woolstapler, and proved also that the defendant spoke the words, "He was a bankrupt at Cirencester," and it was held that the evidence supported the allegations, for a trader at Oxford might have been a bankrupt at Cirencester (a).

With respect to words published in a foreign language, and phrases or terms whose use is confined to a particular district or class of people, and not generally understood, it has, as already observed, been said, that no averment as to their meaning is necessary (b). This doctrine seems nevertheless a little extraordinary, since, without such an explanation, the question of law does not appear open upon the record (c). Suppose, for instance, an action to be brought for calling the plaintiff *Idoner* (d), without any averment of the meaning of the term, and that the defendant demurred; since an acquaintance with the Welch tongue forms no part of legal education or practice, the judges would be placed in a strange situation if they were bound to give their judgment upon the legal meaning of the words; but an averment, as

(a) *Hall v. Smith*, 1 M. & S. 287.

(b) See 1 Will. Saund. n. 242.

(c) Hob. 126. 1 Roll. Ab. 86. *Zenobio v. Axtel*, 6 T. R. 162.

(d) In Welch signifying perjured.



to the meaning, would preclude all doubt, since, by his demurrer, the defendant would allow that the meaning of the word was *perjured* or *forsworn*, as alleged in the declaration, and judgment would be given accordingly.

If the plaintiff undertake to translate, and render a foreign word of an actionable sense, by an English one whose meaning is not actionable, the declaration will be defective.

In the case of *Ross v. Lawrence*, the plaintiff averred that the Welch words *Ded ingues Will. Ross in mudon*, signified that the plaintiff was *forsworn*, though in fact they signified that he was *perjured*; and, after a verdict for the plaintiff, judgment was arrested (e).

In an action for slander of the plaintiff's title, it is sufficient to aver his right generally, without setting forth his title. Thus it has been held to be sufficient to aver that the plaintiff was lawfully possessed of certain copper mines, situate, &c. and of certain ore gotten and to be gotten from the said mines, &c. (f).

In the next place it is necessary to connect the publication with the previous facts, by means of an appropriate averment (g).

(e) Sty. 263. *Ross v. Lawrence*.

(f) *Rowe v. Roach*, 1 M. & S. 304.

(g) To avoid circumlocution, the term colloquium is frequently used, not in its strict sense as denoting a conversation on the subject of the matters previously averred, but as a general

Where the words are actionable, as affecting the plaintiff in a special character, an averment that they were applied to him in that particular character is necessary (*h*), unless that application necessarily appear from the words themselves ; in which case, the general allegation that they were spoken concerning the plaintiff, is sufficient.

The defendant said of a tradesman (*i*), “ He is a sorry pitiful fellow, and a rogue, he compounded his debts at five shillings in the pound ;” and the declaration was held to be good, without an express colloquium of the trade.

So, where the words published of a tradesman (*k*) were, “ Have a care of him, do not deal with him, he is a cheat, and will cheat you ; he has cheated all the farmers at Epping, and dares not shew his face there, and now he is come to cheat at Hatfield.” And the court said, the words themselves supply a colloquium, they appear to be spoken of his trade.

So, where the words spoken of a justice of the peace were, “ I have been often with Sir John

averment, that the publication was made of and concerning those facts.

(*h*) *Savage v. Robery*, 2 Salk. 694. *Savile v. Jardine*, 2 H. Bl. 531. *Burnett v. Wells*, 12 Mod. 420. Str. 1169. 3 Salk. 326. Ld. Ray. 610. 8 Mod. 271. Cro. Car, 417.

(*i*) Lord Raymond, 1480. *Stanton v. Smith*.

(*k*) 2 Lev. 62.

Isham for justice, but could never get any thing at his hands but injustice ;" it was held that the words were actionable without any colloquium, and that the court would intend that the words were spoken of him as a justice, and not as a private man (*l*).

So, where the defendant said of an attorney, " He is a common barretor ;" it was held to be unnecessary to aver that the words were spoken of the plaintiff in his profession, for the court would intend it, and that words were to be construed *secundum conditionem personarum* of whom they were spoken.

So, where (*m*) the words spoken to a merchant were, " He is not worth a groat, he is £100 worse than nought."

So, where the defendant said to a physician (*n*), " Thou art a drunken fool and an ass, thou wert never a scholar, and art not worthy to speak to a scholar." The words were held to be actionable, though no communication was laid of the plaintiff's profession.

In general, where facts extrinsic of the words and of the plaintiff's character are necessary to support the action, the plaintiff must aver that

(*l*) Cro. Car. 15. 192. 459. Cro. J. 557. 1 Lev. 280.

(*m*) Cro. Car. 265.

(*n*) Cro. Car. 270.

the publication was made in reference to those facts.

The declaration (*o*) stated that the plaintiff, a constable of D., was sworn before the justices at their quarter sessions concerning an affray made by the defendant upon one F. and that the defendant then and there in the said court and in the presence of the justices, said, he (innuendo the plaintiff) is forsworn, and it was held, that the declaration was bad without a colloquium of the oath so taken, because it was necessary for the declaration to shew that the words intended a false oath in a court of record.

The declaration (*p*) stated, that the plaintiff had put in an answer upon oath to a certain bill filed against him in the court of exchequer by the defendant, and that the latter, in a certain discourse which he then and there had with one R. W., the plaintiff's servant, said, "I have no doubt you will forswear yourself, as well as your master (the plaintiff) has done, before you," meaning and insinuating thereby that the plaintiff had perjured himself in what he had sworn in his aforesaid answer to the said bill so filed against him as aforesaid.

In another count, the words spoken by the de-

(*o*) *Drake v. Corderoy*, in error, Cro. Car. 288.

(*p*) *Hawkes v. Hawkey*, 8 East, 427.

defendant to the said R. W. the plaintiff's servant were laid thus : " Your master (meaning the plaintiff) has both cheated people out of their wages, and forsworn himself ;" thereby meaning that the said plaintiff had perjured himself in the aforesaid answer, so put in by him to the bill so filed against him as aforesaid. It was held, after verdict, that both these counts were bad, on the ground that there was no colloquium laid of the plaintiff's answer to the bill in chancery, and that it did not appear that the words were spoken in relation to that answer, and that without such an averment the innuendo was unwarranted.

And in general a prefatory averment of the defendant's intention to injure the plaintiff, or to impute a particular charge, though it be coupled with a subsequent innuendo to the same effect, will not supply the want of an express averment, that the words were spoken, or libel published of and concerning the plaintiff, or other subject matter which is essential to the slander (*q*).

(*q*) *R. v. Marsden*, 4 M. & S. 164. where it was held to be insufficient in an indictment, to aver that the defendant published the libel with intent to vilify the prosecutor, &c. without an express averment that the libel was published of and concerning the prosecutor, although the libellous expressions were directly applied to him by means of an innuendo. And see *Johnson v. Aylmer*, Cro. J. 126. *Lowfield v. Bancroft*, Str. 924. *R. v. Alderton*, Say. 180.

The averment ought to extend to the whole of the prefatory matter necessary to render the words actionable. The plaintiff (*r*) declared, that some evil persons unknown, had feloniously shorn the sheep of C., and that there being a communication between the defendant and another, *concerning the shearing of those sheep*, the defendant said, "I do know who did shear the sheep;" and being asked who it was, he replied, that it was the plaintiff, *innuendo felonice*, and Houghton and Doderidge, Justices, against the opinion of Croke, J. held, that the words were not actionable since the colloquium was of the shearing of the sheep only, and not of the felony.

It has already been seen that the danger of a variance may often be incurred by the indiscreet averment of too much prefatory matter, and an improper application of the words or libel to such previous facts. It is, however, to be observed, that although more than is necessary be previously alleged, yet that if the colloquium or averment apply the words or libel to so much only of the previous matter as is proper and necessary, a variance in not proving the rest will not be material.

Thus, where the plaintiff averred that he followed two trades, and that the defendant, intending to injure him in those several trades, in a certain

(*r*) 3 Buls. 83. *Helly v. Hender*.

discourse which he had of and concerning the said plaintiff in one of his trades, spoke the words set out, it was held that though the plaintiff failed in proving that he followed both trades, yet that, having proved that he followed the trade concerning which the words were alleged to have been spoken, he was entitled to recover (*s*).

*Innuendo.*

Next, with respect to the nature and office of an innuendo. An innuendo may be defined to be an averment which explains the meaning of the defendant's publication by reference to facts previously ascertained by averment or otherwise (*t*).

An innuendo is frequently necessary, where the language of the defendant is apparently innocent and inoffensive, but where, nevertheless, by virtue of its connection with known collateral circumstances, it conveys a latent and injurious imputation.

Where, from the ambiguity of the defendant's expressions, it is doubtful who was meant, it is the proper office of the innuendo to render the allusion clear, by specifically pointing out the meaning. As where but one or two letters of the name

(*s*) *Figgins v. Cogswell*, 3 M. & S. 369. Note that this was previous to the case of *Lewis v. Walter*, 3 B. & C. 138, where it was held that such an averment is divisible.

(*t*) 2 Salk. 513. 1 Lord Ray. 256. 12 Mod. 139. 1 Will. Saund. 243.





evidence, whether the forswearing did in law amount to perjury, and the question would not be open to the court upon the record ; and besides this, that clearness and precision would be wanting which is essential to a legal and technical statement of the case.

In the *King v. Horne*(*e*), De Grey, C. J. observed, " In the case of a libel, which does not in itself contain the crime without some extrinsic aid, it is necessary that it should be put upon the record by way of introduction, if it is new matter, or by way of innuendo, if it is only matter of explanation. For an innuendo means no more than the words "*id est*," "*scilicet*," or " meaning," or " aforesaid," as explanatory of a subject matter sufficiently expressed before ; as such a one, meaning the defendant, or such a subject, meaning the subject in question."

An innuendo, therefore, cannot extend the sense of the words beyond their own meaning, unless something be put upon the record for it to explain.

As, in an action upon the case against a man, for saying of another (*f*), " He has burnt my barn ;" the plaintiff cannot there say, " innuendo a barn with corn," because that is not

(*e*) 2 Cowp. 683.

(*f*) Barham's case, 4 Co. 20.

an explanation of what was said before, but an addition to it.

But if, in the introduction, it had been averred that the defendant had a barn full of corn, and that in a discourse about that barn, the defendant had spoken the words charged in the declaration of the plaintiff, an innuendo of its being the barn full of corn would have been good; for, by coupling the innuendo in the libel with the introductory averment, "his barn full of corn," it would have made the sense complete.

An innuendo can in no case supply the want of a proper colloquium.

The plaintiff (*g*), in the first count, laid these words as spoken by the defendant, "John Holt (meaning the plaintiff) has forsworn himself, (meaning that the plaintiff had committed wilful and corrupt perjury.) After a general verdict for the plaintiff with entire damages, judgment was arrested, on the ground that the words in the first count were not in themselves actionable, and that the count contained no colloquium or averment of the words having been spoken of a forswearing in a court of justice, and that the innuendo could not extend their meaning.

In the case of the *King v. Alderton* (*h*), the

(*g*) *Holt v. Scholefield*, 6 T. R. 691.

(*h*) *Say. R.* 280.

alleged libel was contained in an advertisement, reciting certain orders made for collecting money, on account of the distemper among the horned cattle, advertised by the clerk of the peace for the county of Suffolk ; and it charged, that by these orders the money collected had been improperly applied. The information stated this to be a libel upon the Justices of Suffolk, In the body of the libel it was not said, " by the order of the justices" nor did the information in the introductory part say that it was a libel of and concerning the Justices of Suffolk. But when the information came to state any of the orders in the advertisement, it added this innuendo, " meaning an order of the Justices of peace for the county of Suffolk;" but these innuendos could not (it was held) supply the want of an averment in the introductory part, of its having been written " of and concerning the Justices," because they were not explanatory of, but in addition to the former matter. And the court were of opinion that the information having omitted the words " of and concerning the justices" in the introductory part, such omission was fatal, and judgment was accordingly arrested.

In the case of *Hawkes v. Hawkey* (i), already referred to, it was decided that where the in-

(i) 8 East, 427.

troductory matter has been properly stated, it is necessary to connect the whole publication with it, by means of a general averment that it related to such previous matter, and that it was not sufficient to do it by means of an innuendo only.

Upon motion in arrest of judgment, Lord Ellenborough, C. J. was of opinion, that it might be collected from what Lord C. J. De Grey said, in Barham's case (*k*), that he conceived an introductory averment that the defendant had a barn full of corn, *and also* an averment that the defendant spoke the words in a discourse concerning that barn, necessary to warrant the innuendo "my barn full of corn." His Lordship added, "If a broad rule has been laid down as to the mode of declaring, in this species of action, whether properly laid down or not, in the first instance, it is better to abide by it, than to attempt making nice distinctions. The only peculiarity in this case which is relied upon, as distinguishing it from the current of authorities, is, the preliminary matter averred respecting the fact of the plaintiff having put in his answer to the bill filed in the exchequer; and the question is, whether the innuendo alone will refer the words spoken to such introductory matter so as to make it necessary for

(*k*) 4 Co. 20.

the plaintiff to prove any thing which he must have proved had a colloquium been laid ; the case of *Savage v. Robery* seems to show that it will not."

And the court (*l*), after considering the case of the *King v. Horne*, gave judgment for the defendant.

In many instances, however, an innuendo will not vitiate the proceedings, though new matter be introduced.

As, where the matter is superfluous, and the cause of action is complete without it.

The plaintiff alleged (*m*), that the defendant addressed these words to him, "Thou art a rogue and a rascal, and hast killed thy wife ; innuendo one Elizabeth, late wife of the plaintiff." And the plaintiff had judgment, though the declaration contained no prefatory averment that the wife was dead.

In *Shalmer v. Forster and his wife* (*n*), the declaration stated that the wife of the defendant spake of the aforesaid plaintiff to Ann Rochester the plaintiff's mother these words : "Where is that lying thiefe, thy son (innuendo the plaintiff), he hath murdered my aunt (innuendo one Dorothy Stoke, the defendant's aunt), and I will prove

(*l*) Cowp. 680.

(*m*) *Wilner v. Hold*, Cro. Car. 489.

(*n*) Cro. Car. 496.

After verdict for the plaintiff, though a motion was made in arrest of judgment upon other ground, no objection was taken to the innuendo of the plaintiff's aunt.

So, where the words were laid (o), "Thou hast robbed the church (innuendo the church of St. Alphege), no objection was taken.

In *Craft v. Boite* (p), the words, as laid in the declaration, were, "He (meaning the plaintiff) hath stolen two hundred pounds worth of plate out of Wadham College," (meaning a college called Wadham College, in the university of Oxford), though the declaration contained no previous averment of Wadham College, in the university of Oxford. It is suggested by the learned editor of Saunders's Reports, that the innuendo is on such account improper; the objection, however, appears to be rather of form than of substance; and probably such a declaration would be held to be good, on general demurrer or after verdict, since the gist of the action is the charge of stealing from Wadham College, which is entirely unconnected with the situation of the college in the university of Oxford, so that the innuendo might be expunged without affecting the cause of action.

(o) 4 Cro. J. 153. 1 Vin. Ab. 512.

(p) 1 Will. Saun. 243.

In *Roberts v. Cambden* (q), the defendant said "He (meaning the plaintiff) is under a charge of a prosecution for perjury. G. W. had the attorney-general's directions to prosecute;" and an innuendo that the attorney-general for the county palatine of Chester was meant, was rejected as surplusage.

An innuendo, when repugnant or insensible, may be rejected (r).

The record of *Nisi Prius* stated, that the said William spoke of the said James these scandalous words following: "He (innuendo the said *William*) is a thief," where the innuendo should have been of James. After a verdict for the plaintiff, it was held that he was entitled to his judgment, since the innuendo was void, and an apparent misprision.

It does not, in any case, seem necessary that the innuendo should in terms state the legal inference which is to be drawn from the publication, as connected with the facts stated, its office seems more properly confined to mere reference of the defendant's meaning to previous matter; and, indeed, such an averment would be improper, since the actionable nature of the charge is a matter of law, which the court will collect from

(q) 9 East. 93.

(r) Cro. Car. 512. See also *R. v. Aylett*, 1 T. R. 63. where door was by the innuendo explained to mean *outer door*.

the facts, if they warrant such a conclusion ; and if they do not, no innuendo of their legal effect will avail to render them actionable.

Thus, where, from the circumstances, it appears upon the whole that the defendant intended to impute a charge of wilful murder, it is unnecessary for the plaintiff to assert, by way of innuendo, that the defendant meant to impute the very crime of murder.

In *Peake v. Oldham* (s), in error, the plaintiffs declared, that upon a colloquium concerning the death of one Daniel Dolly, the defendant said to the plaintiff, " You are a bad man, and I am thoroughly convinced that you are guilty (meaning guilty of the death of the said Dolly), and rather than that you should want a hangman, I will hang you."

After a general verdict with damages, the defendant brought a writ of error. Judgment however, was affirmed, though the count alluded to contained no express allegation, by way of innuendo or otherwise, that the defendant intended to charge the plaintiff with the crime of murder.

And though in the above case special damage was laid, it appears that the court held the words to be in themselves actionable ; and Lord Mansfield observed, " These words plainly show what

(s) 1 Cowp. 275.



species of death the defendant meant, and therefore manifestly in themselves import a charge of murder." On the contrary, if the plaintiff undertakes to explain the import of the words, by specifying the particular imputation intended by the defendant, such explanation will not vitiate the declaration, provided such an intention can be collected from the circumstances. Thus, in the case last alluded to, where a colloquium was laid concerning the *death* of Daniel Dolly, the plaintiff, in his fifth count, laid the words, "You are guilty," (innuendo of the murder of D. D.) And the count was held good after verdict, though the colloquium was of the death only, and the innuendo of the murder (t).

An innuendo in one count may be supported by a colloquium in a previous one. In *Tindall v. Moore* (u), the words laid in the first count were, "That rogue Joe Tindall (meaning the plaintiff) set the house on fire," meaning the summer-house that was burnt in the occupation of one Mr. Cotton. In the fifth count the words were, "Joe Tindall (meaning the plaintiff) set the house on fire," (meaning the same house). It was moved, in arrest of judgment, that the words in the last count were not actionable, for

(t) See also *Woolnoth v. Meadows*, 5 East, 463, and *Dame Morrison v. Cade*, Cro. J. 162.

(u) 2 Wils. 114.

that every count in a declaration is a substantive count, and that the innuendo (meaning the same house) could not relate to the summer-house mentioned in the first set of words. But by the court, although the last set of words be not of themselves actionable, yet they shall have relation to the former set.

From these decisions it appears, that the colloquium and innuendo are averments, whose office it is to connect the defendant's publication with the prefatory matter.

That the first is a general averment, connecting the whole of the publication with the previous statement; the latter a subordinate averment connecting particular parts of the publication with what has gone before, in order to elucidate the defendant's meaning more fully.

That the want of the colloquium cannot be supplied by an innuendo.

That the office of the innuendo is confined to a simple explanation of the defendant's meaning by reference to previous matter. That it cannot, in any case, supply the want of prefatory averments and of a colloquium, in order either to explain or extend the meaning of the words or libel set out, where such an explanation or extension, with reference to extrinsic matter, is necessary.

It would not be easy, or perhaps possible, to point out a more clear and convenient process

for technically stating a case upon the record, than this, which has with great wisdom been adopted by the law from very early times ; it combines simplicity with precision, separating the law from the facts, and exhibiting a statement of the cause of action on the face of the record, plain and distinct in all its parts.

It is true that, in some instances, justice may be defeated from want of attention to the maxims which regulate this kind of statement ; but it is equally true, that this cannot happen without faulty inattention to a few plain and rational rules, and that the failure might have been prevented by the exertion of a moderate share of prudence, aided by a very small stock of legal knowledge ; and that, on the other hand, the general advantages, in point of perspicuity and legal precision which result from an adherence to these rules, are too great to be placed in competition with the rare and partial inconvenience arising from ignorance or inattention.

*Averment of Malice.*

NEXT, as to the averment of the defendant's intention.

Malice either in law or fact is essential to the action, and, consequently, a corresponding allegation is essential to a complete declaration.

No precise and prescribed form of words is requisite for this purpose, though the term *malicious*, as applied to the matter published, and *maliciously* to the act of publishing, are the most usual and appropriate terms (a).

Any form of words will suffice from which the malicious intent can be inferred; thus it has been held to be sufficient to aver, that the defendant spoke the words or published the libel falsely or wrongfully (b), or that the defendant *machinans pejorare dixit* (c).

And Rolle, C. J. (d) was of opinion, that in a declaration it is not necessary to use either the word *falsely* or *maliciously*, though it is otherwise in case of an indictment or information. But it is suggested by Mr. Serjeant Williams, in his

(a) As to the limited and technical sense in which malice is used as descriptive of this species of injury, vide *supra*, 3, 209, 292. and *infra*. 454.

(b) Moor, 459. Ow. 51. Noy, 35.

(c) Danv. 166. Com Dig. tit. Defamation, G. 5.

(d) Sty. 392.

notes on Saunders (*d*), that this must be taken to mean that the omission would not be fatal after verdict.

But such words, it seems, are essential in indictments and informations (*e*).

It has been the fashion with pleaders, both ancient and modern, to deal so profusely in the evil motives and intentions attributable to the defendant, that few cases are to be met with where any objection has been taken, for want of an averment of this nature.

It does not appear to be necessary (*f*) for the plaintiff to make any averment by way of exculpation, since it is incumbent on the defendant, in case he mean to rely on the justice of the charge in his defence, to plead the justification specially, and he cannot give it in evidence under the general issue.

And perhaps the averment of innocence, on the part of the plaintiff, of the charge cast upon him, or of the falsity of the defendant's publication, would be considered as unnecessary, on account of the general presumption which the law entertains of a man's innocence till the contrary be made to appear. Formerly, however, it was held to be incumbent upon the plaintiff not only

(*d*) 2 Will. Saund. 242.

(*e*) Sty. 392. Per Roll. C. J. 1 Vin. Ab. 533. pl. 3.

(*f*) 2 Wils. 147.

to aver the falsity of the charge in general terms, but also to negative particular facts contained in the publication complained of; for instance, where the slander was published as heard from another (*g*), it was held to be necessary to aver that the defendant had not heard it.

But in *Hooker v. Tucker* (*h*), it was held by Holt, C. J. that in a declaration for these words of a trader, "He is a pitiful fellow, and not able to pay his debts," there needed no averment that he was no pitiful fellow, and that he was able to pay his debts.

So, in *Bendish v. Lindsey* (*i*), where the action was brought for charging the plaintiff with bribery at an election, the defendant, holding up some guineas in his hand, said of the plaintiff, who was a candidate, "These guineas are Mr. Bendish's money, and were given me to vote for him; he has bought my vote, and he shall have it." It was objected in arrest of judgment, after verdict for the plaintiff, that it was not averred throughout the whole pleading, that the plaintiff did not give the money. But Holt, C. J. said, it need not be averred that the plaintiff did not give the money, for it is said, *hæc falsa ficta malitiosa verba*, which is well enough.

(*g*) Morrison's case, Sheppard, Ac. 267.

(*h*) Holt, R. 39.

(*i*) 11 Mod. 194.

The falsity of the charge may be implied from the averment that it was made *ex malitiâ*, since the term, in its legal sense, imports a publication without legal excuse (*k*).

Where a party repeats the slander of another, knowing it to be false, and that the author has retracted his assertion or opinion, it seems that an action is maintainable against the reporter, though, at the time of publication, he announced the name of the person from whom he heard it; but, in such case, it would be proper to aver the defendant's knowledge in the declaration; for, if the fact were not to be averred in the declaration, and the defendant pleaded that he gave the plaintiff a cause of action by naming his author, the plaintiff might be considered as precluded from replying that the defendant maliciously published the slander against his own knowledge and conviction; for if he could reply it, issue must necessarily be joined upon the fact of knowledge, which, as has been held, is not traversable.

Thus, in the case of *Sir G. Gerrard v. Dickenson* (*l*), the action was brought for publishing a lease, knowing it to be counterfeit, and thereby

(*k*) *Johnson v. Sutton*, 1 T. R. 493. Cro. Car. 271. Supra. 3, 209, 292. Infra. 454.

(*l*) 4 Rep. 18.

hindering the plaintiff from letting his land ; the defendant pleaded, that she found the lease, and traversed her *knowledge* of the forgery ; and the plea was held to be insufficient, because the knowledge of the forgery is not traversable any more than the *scienter* in an action on the case, where the defendant's dog has bit the plaintiff's cattle, and where the plaintiff avers that the defendant *knew* that the dog was accustomed to bite sheep. The objection to traversing the *scienter* which has been assigned, is, that it is no direct allegation, nor ever alleged in any *place*, and therefore cannot be tried (*m*). This objection, on the score of locality, ceased indeed when it was no longer required that the venire should be awarded from the vicinage ; and there seems to be no very satisfactory reason why a party in pleading should not confine the evidence by traversing any distinct circumstance which is essential to his adversary's case, and which must be proved upon the trial. Since, however, the technical objection to traversing the *scienter* has not been judicially defeated, it would not be proper to omit the averment of knowledge in the declaration, in a case where it is material ; as, where a party has repeated slander, knowing the author to have been convinced of his error, or sets up a lease which he knows to be a forgery, for the purpose of injuring the plaintiff.

(*m*) 4 Rep. 18.



Where particular circumstances have been introduced, to shew the defendant's conduct to have been malicious, it will be necessary to prove them upon the defendant's pleading the general issue (*n*).

It is sometimes advisable, and perhaps necessary, to allege the malicious intention in particular with which the defendant uttered the words or published the libel. Thus it may be necessary, in an indictment or information, to allege that he did so with intent to provoke another to commit a breach of the peace (*o*), or with intent to defame a particular class of persons, or to bring the administration of justice into contempt. Where a libel has been alleged to have been published with several intentions, which are in their own nature distinct and divisible, it will be sufficient to prove that the fact was done with any one of such different intentions, provided the publishing the particular matter with that intention be criminal.

Thus, where a libel was alleged to have been published with intent to bring the administration of justice into contempt, and also to defame particular magistrates, it was held, that the defendant

(*n*) 2 East, 437.

(*o*) See *R. v. Wegener*, Starkie's C. Where Abbott, C. J. held, that a libel written to an attorney and containing reflections on his professional character, was not indictable without an allegation, that it was written with intent to provoke him to commit a breach of the peace.

was liable to be convicted, if a publication, with either of those intentions, was proved (*p*).

Next, as to the statement of the loss or damage to the plaintiff resulting from the wrongful act of the defendant.

Where the words are intrinsically actionable, the loss to the plaintiff is, as has been seen, a mere inference or presumption of law; and it does not seem to be necessary for the plaintiff to aver that the words complained of amount to the charging a precise crime; for their actionable quality is a question of law, and not of fact, and will be collected by the court from the circumstances, if they warrant it (*q*). But in such case, it may frequently be advisable to aver special damage to have been sustained in consequence of the words; such an averment will not prejudice, since it will not be necessary to prove it on the trial. If no such proof be then given, and the jury give a general verdict, the defendant, if it should be necessary afterwards in order to enable him to move in arrest of judgment, may have the verdict amended by confining it (*r*)

(*p*) *R. v. Evans*, Cor. Bayley, J. Lanc. sp. assizes, 1821. See also *R. v. Dawson*, Cor. Holroyd, J. York summer assizes, 1821. Starkie on Evidence, iv. 15, 86.

(*q*) See *Peake v. Oldham*, Cowp. Rep. 275.

(*r*) This is done at chambers, as of course, without a motion in court. The application must be made to the judge

to the actionable words according to the judge's notes.

Formerly it was held (s) that, where the words were not actionable, but the special damage was the gist of the proceeding, such special damage might be given in evidence, although the particular instances of the special damage were not stated in the declaration ; but that, when the words themselves were actionable, particular instances of such damage could not be given in evidence, unless specified on the record.

But modern practice (t) does not warrant this distinction, and at the present day it seems that in both cases the particular damage must be specified.

The general rule of pleading, as to special damage, is, that it must be averred with that degree of certainty and particularity which the case admits of, in order that the defendant may be apprized what it is he comes to answer, though in some cases where particularity would be productive of inconvenience, and the circumstances are not immediately within the knowledge of the party, a more general statement has been deemed to be sufficient.

who tried the cause (if at the assizes), though the record is one of another court.

(s) *Browning v. Newman*, 1 Str. 666.

(t) B. N. P. 7. 1 Will. Saund. 243. n. 5. Str. 166.

Thus the averring generally, that by means of the publication, several customers (not naming them) left the plaintiff's house, is not sufficiently precise (x).

And so, where the alleged damage consists in loss of marriage (x), the plaintiff must point out the individual with whom the marriage would otherwise have been contracted.

And for the same reason, where the plaintiff states a marriage with J. N. to have been hindered, he cannot afterwards give in evidence loss of marriage with any other person (y).

But it has been said, that greater certainty is requisite where the special damage is the gist of the action, than where it is merely laid by way of aggravation (z).

Where the special damage consists in the (a) plaintiff's having been prevented from disposing of, or selling his estate, it is necessary to shew how he was prevented, as that he had taken some steps for the purpose of selling, and that the bidding was stopt by the defendant's act; but it is unnecessary to specify the names of any of the bidders.

(u) B. N. P. 7. 1 Roll. Abr. 58. 8 T. R. 130.

(x) 1 Sid. 396. 1 Vent. 4. Cro. J. 499. 12 Mod. 597.

(y) Lord Ray. 1007.

(z) Per Cur. in *Wetherell v. Clarkson*, 12 Mod. 597. 2 Lut. 1295.

(a) *Smead v. Badley*, Cro. J. 397. Sir W. Jones, 196.

Where the plaintiff (*b*), who had been a preacher in a chapel to a dissenting congregation, averred generally in the declaration, that by reason of the words the persons who frequented the said chapel had refused to permit him to preach there, and had discontinued giving him the gains and profits which they had usually given, and otherwise would have given ; the court held, on motion in arrest of judgment, that where a plaintiff brings an action for slander, by which he lost his customers in trade, he ought, in his declaration, to state the names of those customers, in order that the defendant may be enabled to meet the charge, if it be false ; but that in the principal case, the plaintiff could not have stated the names of all his congregation, and that it was sufficient to say that he had been removed from his office, and had lost the emoluments of it (*c*).

Where actionable words are spoken, within the scope of a private jurisdiction, the declaration may allege a consequential loss of customers at a place beyond the limits of such jurisdiction. For the allegation is only in respect of damages to increase them, and may be inquired of in any place whatsoever (*d*).

(*b*) *Hartley v. Herring*, 8 T. R. 130.

(*c*) 4 Burr. 2424.

(*d*) *Ireland v. Blockwell* in error, Cro. C. 570.

Where the words are in themselves actionable, and the particular character of the plaintiff is stated in aggravation, it is not necessary to state the circumstances of that situation with so great certainty as where it is essential to the action. Thus, where the words are spoken of a candidate to serve in parliament, it is sufficient to state the fact generally, and it is unnecessary to set forth the writ to the sheriff (*e*).

In general (*f*), the place where the words are spoken is immaterial; yet, it has been said that if the plaintiff state the place by way of aggravation, and not merely as venue, he will be bound to prove the speaking to have been in the place named.

With respect to joining different injuries in the same proceeding, words spoken at different times may be included in the same count.

In such case, however, if it should appear on the face of the count that the words were spoken at different times, and that some of them were not actionable, judgment would be arrested if entire damages were given for the whole count.

And a count for oral slander (*g*) may be joined with a count for a libel in the same de-

(*e*) *Harwood v. Sir J. Astley*, 1 N. R. 47.

(*f*) B. N. P. 5. *tamen qu. & vid. Starkie on Evidence*, tit. Variance. *Place*.

(*g*) *King v. Waring and uxor*, 5 Esp. C. 13.

claration. And the imposing *crimen felonie* and causing (*h*) a plaintiff to be brought before a magistrate may be joined with a complaint for a malicious accusation before the magistrate.

If the plaintiff recover, he cannot, it seems, afterwards recover in respect of any special damage which accrued subsequently from the speaking of the same words (*i*).

Where the words are intrinsically actionable, special damage, though averred, need not be proved (*k*).

In the proceeding by writ of scandalum magnatum, the plaintiff declares *tam pro domino rege quam pro seipso* (*l*), though he is entitled to the whole of the damages recovered.

It has been held (*m*), that the statute 2 R. 2. st. 1. c. 5. is a general law, and that the plaintiff need not recite it in his declaration; but that if he undertake to recite it and vary from it in any material point, the declaration will be bad.

Where a charge has been falsely and maliciously made in a judicial form, the plaintiff, as has been

(*h*) Cro. Car. 271. Note that the court held that the charge before the magistrate was not in the nature of a conspiracy, but was an aggravation of the false and malicious accusation.

(*i*) B. N. P. 7. tamen qu. & vid. 2 Mod. 151. contra.

(*k*) Cook v. Field, 3 Esp. C. 133.

(*l*) 6 Bac. Ab. 100. 1 P. Will. 690.

(*m*) 4 Co. 12 b. Cro. Car. 136. Com. Dig. Defam. B. 3.

seen, cannot declare simply on the slander (n), but must found his action on the particular circumstances of the case. The declaration must shew,

1st. A prosecution instituted and determined.

2dly. That the defendant acted maliciously and without probable cause in the prosecution of a false charge.

3dly. The damage resulting to the plaintiff.

1st. A prosecution instituted by the defendant and since determined.

The fact of the prosecution must of course be alleged according to the particular circumstances.

Where the prosecution was by preferring a bill of indictment, which was found to be a true bill, the declaration may state that the defendant indicted, and caused and procured to be indicted, the said plaintiff, and the material parts should be set out. But where the jury have thrown out the bill, it should be described as a *bill* and not as an *indictment* (o).

Formerly it was held to be necessary to shew, that the prosecution was instituted before a court of competent jurisdiction, to try the supposed of-

(n) Vide supra. 276, and it seems that in general where the action is not maintainable, unless the act be done *maliciously and without probable cause*, the declaration ought to aver the special circumstances and allege the malice and want of probable cause.

(o) Com. Dig. Ind. B. 5 Taunt. 187. 1 Salk. 376.



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fender for the offence imputed (*p*). But it seems to be now settled, that an action on the case may be supported for an arrest, though the court from which the process issued had no jurisdiction (*q*), and that an action may be supported for a malicious prosecution of a defective indictment, and, therefore, at this day, it does not appear to be necessary to make any averment (*r*) as to the competency of the court.

And it has been held, that the style of the court need not be exactly copied (*s*).

If the declaration set forth an indictment containing several charges, it is sufficient to prove that some of them were maliciously preferred, though there was ground for the rest (*t*).

It is not necessary, as in a declaration for slan-

(*p*) Com. Dig. Action on the case for a conspiracy. C. 4. Rol. Ab. Action sur case, 50.

(*q*) 2 Wils. 302.

(*r*) 4 T. R. 247. 2 Str. 691. 1 Salk. 15. Such an action lies in respect of a malicious charge in the Ecclesiastical Court. Gibs. 216. Bunb. 247. Burn's Ecc. Law. tit. Churchwarden.

(*s*) Where the plaintiff alleged an indictment at the *quarter sessions*, and by the record it was at the general sessions, the word *quarter* was rejected as surplusage. *Busby v. Watson*, 2 Bl. 1050. But it was held, that it would have been otherwise, if the offence had been cognizable only at the quarter sessions, and not at the general sessions. See also *Constantine v. Barnes*, Cro. J. 32.

(*t*) *Reed v. Taylor*, 4 Taunt. 616.

der or libel, to state the very words or expressions used in making the charge: for the malicious prosecution, and not the words themselves, is the gist of the action. But it is necessary to state the substance of the charge. Where the prosecution is by indictment, the declaration should state the material parts of the indictment. Where the prosecution is by application to a magistrate, the substance of the charge should be stated according to the magistrate's warrant, or from the written examination of the defendant before the magistrate, where the contents of those documents can be ascertained. It is sufficient to describe the substance of the charge and advisable to state merely the substance, in order to avoid the danger of variance.

Where the declaration, professing to set out the substance of the charge, in specifying the goods and their value, used the word *valoris* for *valentiæ*, it was held that the variance was immaterial (u). But it was said, that it would have been otherwise, had the indictment been set out in *hæc verba* (x). So where the declaration alleged that the defendant charged the plaintiff before the magistrate with assaulting and *beating* him, and the charge was, in fact, for assaulting and *striking*, it was held that the description was

(u) *Johnson and uzor v. Browning*, 6 Mod. 216.

(x) *Ib.*

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in substance correct (*y*). So, where the declaration for a malicious arrest stated the warrant to be to arrest the plaintiff for an assault, with intent to rob A. (the informant), and the words of the warrant were to rob, as he verily believes (*z*). Where the declaration alleged that the defendant charged the plaintiff with felony before a magistrate, it was held that the averment was supported by proof of a charge made, stating the suspicion of the defendant (*a*).

A general allegation that the defendant made a charge of felony, &c. (*crimen felonizæ imposuit*) is sufficient, or at least it is good after verdict (*b*). For such an allegation is not supported by proof of mere words without going before a magistrate and preferring *crimen*, that is a charge of felony, without reference to the precise mode.

(*y*) *Byne v. Moore*, 1 Taunt. 589.

(*z*) But note that a juror was afterwards withdrawn.

(*a*) *Davis v. Noak*, 1 Starkie's C. 377. Cor. Lord Ellenborough, C. J. and afterwards by the Court of King's Bench, Bayley, J. dissentiente.

(*b*) See *Davis v. Noak*, 1 Starkie's C. 377. And it was held, in that case, by three of the judges (Bayley, J. dissentiente), that such a charge is supported by evidence, that the defendant stated to the magistrate that he had been robbed of certain specified articles, and that he suspected and believed, and had good reason to suspect and believe, that the plaintiff had stolen them.

In the case of *Blixard v. Kelly* (c), it was held, that a count alleging that the defendant had wrongfully, and without reasonable or probable cause, imposed the crime of felony on the plaintiff, was good after verdict. In the case of *Coleman v. Goodwin*, cited from the note book of Gibbs, L. C. J. the ninth count of the declaration, on which the plaintiff had obtained a general verdict, alleged that the defendant had imposed the crime of having been guilty of unnatural practices on the plaintiff, and the court refused to arrest the judgment, saying, that it must be understood to mean an accusation before a magistrate, but that in such an accusation it was not necessary to make use of words of legal charge, that is made out afterwards by evidence.

But if the defendant, before the magistrate, stated facts, which shewed the plaintiff to have been guilty merely of a tortious conversion of the defendant's goods, on which, however, the magistrate erroneously issued a warrant for felony, the circumstances will not warrant an allegation that the defendant charged the plaintiff with a felony (d).

2ndly, The determination of the prosecution

(c) 2 B. & C. 283.

(d) *Leigh v. Webb*, 3 Esp. C. 167. 1 Starkie's C. 67.; and see *Cohen v. Morgan*, 6 D. & R. 8.

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must be shewn by proper averments (*e*). Where the plaintiff has been actually acquitted by the verdict of a jury, it ought to be alleged that the plaintiff was, in due form of law, *acquitted* (*f*) according to the fact. And it would, it seems, be insufficient to allege merely that the plaintiff was released and discharged from the said imprisonment (*g*). And care should be taken to allege the acquittal according to the fact. If the declaration allege an acquittal in Bank, it will not be satisfied by proof of an acquittal at Nisi Prius (*h*). But if the day, on which the acquittal is alleged

(*e*) Willes, 250. n. a. 1 Doug. 215. 10 Mod. 209. Com. Rep. 190. 1 Esp. C. 79. Bac. Ab. Action on Case, H. Com. Dig. Action on Case, Conspiracy, C. 5. 2 T. R. 225—232. 1 Will. Saund. 228, *Alverton v. Tregono*, Yelv. 116. *Lewis v. Farrell*, Str. 114. *Parkes v. Langley*, Gil. R. 163.

(*f*) The word acquitted must be taken in its legal sense, viz. by a jury, 2 T. R. 231. Where the declaration alleged that the plaintiff, by a jury of the county of —, was duly and in lawful manner acquitted, and by the record it appeared that the jury found the plaintiff not guilty; and upon that verdict the judgment of the court was, that the plaintiff should go thereof acquitted; it was holden to be sufficient for *reddendo singula singulis*, the plaintiff was duly acquitted by a jury, that is, found not guilty of the facts, and in a lawful manner acquitted by the judgment of the court. *Hunter v. French*, Willes, 517.

(*g*) *Morgan v. Hughes*, 2 T. R. 225.

(*h*) *Woodford v. Ashley*, 11 East, 508.

to have taken place, be not averred by way of description of the record, a variance from the day of acquittal, as alleged, will not be material. Thus where the declaration averred that *afterwards*, to wit, on the morrow of the Holy Trinity, &c. the plaintiff was in due manner and by due course of law acquitted; and, by the record of Nisi Prius, it appeared that the acquittal took place on Tuesday next after the end of Easter Term, the proof was held to be sufficient (i). It would be otherwise, if the day were so alleged as to be descriptive of the word (k). But if the date be not alleged as descriptive of the word, a variance would not be fatal, though the acquittal were unnecessarily alleged with a *prout patet per recordum* (l).

An allegation that the plaintiff has been discharged by the grand jury's throwing out the bill, sufficiently shews that the prosecution has been legally determined (m).

(i) *Purcell v. Macnamara*, 9 East, 157. over-ruling the case of *Pope v. Foster*, 4 T. R. 590. and see *R. v. Hucks*, 2 Starkie's C. 521, and *R. v. Payne*. Cor. Lord Kenyon, West. Sittings after Mich. 29 G. 3. See Starkie on Evidence, pt. iv. p. 910.

(k) 9 East, 160. *Green v. Rennett*, 1 T. R. 656.

(l) *Stoddart v. Palmer*, 3 B. & C. 2. Co. Litt. 303 *Wate v. Briggs*, 1 Lord Ray. 35. 3 Salk. 565. See the case of *Phillips v. Shaw*, 4 B. & A. 435. 5 B. & A. 984. *Gadd v. Bennett*, 5 Price, 549. *Rastall v. Stratton*, 1 H. B. 49.

(m) 2 T. R. 232.

Where the plaintiff has been discharged, after examination before a magistrate, or after such examination, the prosecutor has abandoned the charge, and where an absolute acquittal cannot be alleged, it should be alleged that the plaintiff was discharged out of custody, fully acquitted and discharged of the said supposed offence, and that the complaint and prosecution have been abandoned by the prosecutor, and were wholly ended and determined (*n*).

It must be alleged that the defendant acted falsely and maliciously, and without any reasonable or probable cause in preferring the charge. But it seems that the word falsely, without maliciously, would suffice (*o*).

3dly. The *damage* resulting to the plaintiff. This may be either to his person by imprisonment, to his reputation by scandal, or to his property by expense (*p*) ; or it may consist in the personal labour and trouble imposed on the plaintiff in procuring his acquittal or discharge, and the pain and anxiety of mind naturally occasioned by the pendency of a criminal charge.

(*n*) See Chitty on Pleading, vol. 2. p. 293, 3d edit. The omission to shew the determination of the former prosecution will be aided by verdict. Com. Dig. Action on the Case, Conspiracy, C. 5. Bac. Ab. Action on Case, H.

(*o*) 1 T. R. 544. 4 Burr. 1974. 1 Wils. 232. B. N. P. 14.

(*p*) See 1 T. R. 493. Gilb. Cas. L. & E. 185. 202. 12 Mod. 208. Chitty on Pleading, vol. 2. 290, 3d edit.

## CHAPTER XVII.

*Of the Defendant's Plea.*

THE principal circumstances of which the defendant may avail himself in resisting an action for slander have already been adverted to (a), the technical mode of answering the charge on the record is next to be noticed.

Under this division it is to be considered—

1st. In what cases the defendant may give his defence in evidence under the general issue, and in what instances he is confined to the plea of the general issue.

2dly. In what cases the defence may be pleaded specially, and in what cases it must be so pleaded.

3dly. How it should be specially pleaded.

1st. The defence may consist either in a mere denial of the fact of publishing the injurious matter as alleged, or of the damage alleged to have resulted from it, when such consequential damage is the gist of the action, or of matter of justifica-

(a) *Supra.* Ch. 9 to 14 inclusive.



tion or excuse, arising from collateral circumstances, or in some matter which has discharged a previously existing right of action. The plea of the general issue, 'not guilty,' obliges the plaintiff to prove all the facts, as alleged in his declaration, which are essential in law to his right to recover; consequently the plea of the general issue is proper and sufficient in all cases where the defendant means to deny or disprove any fact essential to the plaintiff's case. As where he means to deny that he spoke the words, or published the libel set forth in the declaration, or that the terms of the alleged slander were used in the calumnious and actionable sense attributed to them by the plaintiff, or that the injurious consequence alleged by the plaintiff resulted from the act of speaking or publishing complained of.

And he may also, in all cases where the occasion and circumstances of the speaking or other publication are such as to call on the plaintiff to prove express or actual malice, establish such occasion and circumstances by evidence under the general issue, and the proof will serve as a defence, unless it appear that he acted not honestly according to the occasion, but out of actual malice and ill-will.

For in such cases, that is where the occasion and circumstances of the speaking the words, or

publishing the libel, throw it on the plaintiff to prove a dishonest and malicious intention in fact, such proof becomes an essential part of the plaintiff's case; and, therefore, the evidence offered to rebut it is properly admissible, under the plea of the general issue.

So again, if the immediate occasion and circumstances of the publication be such as to exclude the plaintiff's action altogether, without regard to the question of motive or intention, the general issue is a sufficient plea; for then the defendant has not acted wrongfully or maliciously in a legal sense; in other words, the occasion rebuts the inference of legal malice (*b*), which is essential to the action.

(*b*) It is again to be observed, that legal malice is the same in effect with the absence of legal excuse, where the act itself is wilful and is unlawful. And, therefore, it would be more proper to say, that by law the particular occasion is a bar to the action, than to say that the particular occasion rebuts the inference of malice. Malice, in the legal sense, being but negatively essential to the right of action, it is but superfluous and circuitous to say, that the absence of a legal excuse is rebutted by the existence of a legal excuse, and so the action is barred. It is probable that at an early period, and before the law itself had, by the aid of increased experience, declared and defined the circumstances which should afford a legal defence, but when, nevertheless, it still was necessary to lay down some limit, in order that mutual communications might not be too much fettered, the existence or absence of *actual malice* was constituted the legal limit to the action. It would, in

And, therefore, the defendant may shew that when he did the act complained of, he was acting as a judge or juror, or as a party or witness in a judicial proceeding.

Under this plea the defendant may also shew that the publication complained of was procured by the contrivance of the plaintiff, with a view to an action, for in such case he was the voluntary author of the mischief (*c*).

He may also shew, under this plea, that the action has been discharged by matter subsequent as by accord and satisfaction (*d*), or by a release.

process of time, be discovered that such a limit was inconvenient in itself, and not sufficiently supported by principle to constitute the general boundary between legal and illegal communications; that it was better that the law should, *in reference to the occasion*, distinguish between privileged and illegal communications, and that, on the one hand, some occasions ought to constitute an absolute defence, without reference to motive; that, on the other, where the law afforded no protection, the mere absence of an actual and deliberate intention to injure ought not to be a defence to an action for wilful defamation. Malice, however, was still retained as a descriptive term, though it had necessarily acquired a new and technical sense.

(*c*) *King v. Waring and ux.* 5 Esp. C. 13. See also *Smith v. Wood*, 3 Camp. 323. Where the defendant having shewed to the witness, at the request of the latter, a caricature of the plaintiff, it was held that this was not sufficient to support the action. See also *Weatherstone v. Hawkins*, 1 T. R. 110.

(*d*) *Lane v. Applegate*, 1 Starkie's C. 97. The plaintiff

Next, in what cases is the defendant confined to the plea of the general issue. Where the defendant seeks simply to deny the fact of publishing the alleged slander or its application, or consequences, according to the ordinary and elementary bill of pleading he must confine his plea to the general issue, and cannot plead the matter specially, for though it were specially pleaded, it would still amount but to the general issue.

So it seems that in all cases where the circumstances and occasion of the speaking the words, or publishing the libel, do not furnish an absolute bar to the action, without regard to the defendant's motives and intention, but merely throw it on the plaintiff to prove malice in fact, the defendant cannot plead such occasion and circumstances specially, but must plead the general issue ; for such facts do not supply an absolute bar to the action, but merely a conditional one, the condition being the absence of express or actual malice, which is always a question for the jury. Such facts, therefore, cannot be pleaded specially, for if they were the effect would be to take away that question of fact from the consideration of the jury, upon which the whole case

agreed to wave his right of action, if the defendant would destroy certain documents, which the defendant accordingly did, and it was held that this evidence was admissible in bar of the action under the general issue.

depended (e) the decision of which lay within their own peculiar province.

Such a plea would be bad in point of law, in reference to the ordinary and elementary principles of pleading; for every plea ought to disclose such facts as, if they be true and stand uncontradicted and unqualified, supply an answer to the action. But in the class of cases alluded to, all the facts might be true, and yet by reason of the existence of express malice they would afford no answer to the action.

It seems, therefore, to be clear in principle, that whenever the occasion and circumstances of the speaking or publishing do not furnish an absolute bar to the action, but merely throw it on the plaintiff to prove malice in fact, the defence cannot be specially pleaded, but must be given in evidence under the general issue (f).

If the repetition of slander, from the report of

(e) Abbott, L. C. J. in the case of *Lewis v. Walter*, 4 B. & A. 605., intimated, that special matter of defence could not be pleaded in bar, unless it supplied an answer to the charge of malice. If the plea were, in addition to the disclosure of such facts as rendered proof of actual malice essential, also to negative the existence of malice, it would be demurrable; for, contrary to the first rules of pleading, it would both deny that which the plaintiff would be bound to prove under the general issue, and it would confess and avoid.

(f) See *Lewis v. Walter*, 4 B. & A. 605.

another, affords not an absolute and peremptory bar to the action, but merely a qualified one, dependent on the absence of express malice, it seems to be very doubtful whether such a defence can be specially pleaded (*g*).

Where the action is brought for claiming title to an estate, by means of which the plaintiff is prevented from selling or letting it, and the declaration alleges that the defendant asserted a false title, *knowing it to be false*, if the defendant has in fact any colour of claim, he should plead the general issue; by which means the plaintiff will be obliged to prove, under the general issue, that the defendant knew it to be false (*h*); and the fact of knowledge cannot, it seems, be traversed in pleading (*i*).

As the action for a malicious prosecution, is an action on the case in which the plaintiff is bound to allege all the circumstances of the prosecution, and that it was instituted maliciously and without probable cause, the proper plea in bar is the general issue.

2dly. On the other\* hand, it seems to be clear, that in all cases where the occasion or circumstances attending the speaking or publishing,

(*g*) See *Lewis v. Walter*, 4 B. & A. 605. *supra*. 337.

(*h*) 2 East, 237.

(*i*) 4 Co. 18. Cro. J. 398. Probably so held because there could be no proper venue.

furnish an *absolute* bar to the action, the defence *may* be specially pleaded ; for, in all such cases, the plea admits the facts alleged by the plaintiff, but shows, by the allegation of other additional facts, that, upon the whole of the case, the plaintiff is not entitled to recover : in other words, the defendant by his plea *confesses* and *avoids* the statement made by the plaintiff ; and, therefore, he may plead (i) specially that the imputation was true, that the words were spoken, or the alleged libel published by the defendant, as a member of either house of parliament, in the course of his parliamentary duty (k). By a judge acting in his judicial capacity (l). By an advocate in the management of a cause where they are pertinent to the issue, and have been suggested by the client (m). By a party to a parliamentary or judicial proceeding, according to the ordinary course of such proceedings (n).

So, the defendant may not only by means of a special plea justify his act, but he may also show

(i) Such a defence, as will be seen, *must* be pleaded specially ; see below.

(k) 1 Esp. C. 226. 1 W. & M. st. 2. c. 2. *R. v. Croxey*, 1 M. & S. 273.

(l) 2 N. R. 141.

(m) Cro. J. 90. Poph. 69. See *Scarlett v. Hodgson*, 1 B. & A. 232.

(n) *Lake v. King*, 1 Saund. 132. 3 Lev. 169.

by extrinsic matter, that the words or alleged libel are not in their own nature actionable.

For although such a defence involves a denial of that which the plaintiff, under the plea of the general issue, would be bound to prove, that is, that the words or libel were really used and applied in the injurious sense and manner alleged by the plaintiff; yet, it admits the speaking or publishing the words or libel stated, and supplies facts, which, if true, show that the matter published is not in its own nature actionable; and, consequently, renders the allegations of the plaintiff, as to the motives of the defendant, and the application of the matter published, wholly immaterial (o).

The general rule, as laid down in *Cromwell's* case (p), is, that the defendant shall never be put to the general issue when he confesses the words and justifies them, or confesses the words, and by special matter shows that they are not actionable.

And therefore it has been held that, in an action for calling the plaintiff a murderer, it may be pleaded that the word was used in the course of a conversation about unlawful hunting, and that the words merely imported that the plaintiff was a

(o) If the fact be justified, the motives intention and manner are immaterial, Burr. 807.

(p) 4 Rep. 14. Poph. 66.



murderer of hares (*q*). So, where the plaintiff declared upon an imputation of an unlawful maintenance, it was held that the defendant might justify, by showing that the words were used in reference to a lawful maintenance (*r*).

So, in the case of *Kinnersley v. Cooper* (*s*). The plaintiff declared that he had taken an oath, which was recorded in the court of the Guildhall, in a judicial proceeding ; and that the defendant, speaking of that oath, had said, that he had sworn falsely. The defendant, in his plea, denied that any such oath had been taken ; and the plaintiff demurred, on the ground that the taking the oath was but conveyance to the action, and not traversable ; and secondly, that the plea was bad, since it amounted to the general issue. But the justices were of opinion that the matter was traversable, since the action was grounded upon it.

In the case of *Lord Cromwell v. Denny* (*t*), the plaintiff declared in *scandalum magnatum* against the defendant, for having charged him with liking those who maintained sedition.

The defendant pleaded that he was vicar of Northlinham, which was a benefice with the

(*q*) 4 Rep. 14.

(*r*) Cro. Jac. 90.

(*s*) Cro. E. 168. 4. Rep. 14.

(*t*) 4 Rep. 14.

cure of souls ; and that the plaintiff procured J. T. and J. G. to preach severally in the church of Northlinham ; who, in their sermons, inveighed against the Book of Common Prayer, which was established by the queen and the whole parliament in the first year of her reign, and affirmed it to be superstitious and impious ; upon which the plaintiff and defendant, speaking in the said church of these sermons, because the vicar knew that they had no license, nor were authorized to preach, when they were ready to preach, before their sermons, forbade them, but they, by the encouragement of the plaintiff, proceeded, when the plaintiff said to the defendant, " Thou art a false varlet, I like thee not." To which the vicar said, " It is no marvel that you like not of me, for you like of these (innuendo the said J. T. and J. G.) that maintain sedition against the queen's proceeding." It was moved, by the plaintiff's counsel, that the plea was bad, since, if the matter contained in it amounted to a justification, then upon a dialogue between the parties, the defendant was not guilty, and that he ought to have pleaded so, and given the matter in evidence. But the court held, that the defendant had done well to show the special matter by which the sense of the word sedition appears, upon the coherence of all the words, not

to mean any violent and public sedition, as it had been described to mean, and as *ex vi termini* the word itself imports (u).

It seems, also, that the defendant may either plead, or show by evidence on the general issue, that the right of action which once existed has been discharged as by a subsequent release.

It seems also that, in general, any matter which in law discharges a right of action, for any slander or libel, may be either given in evidence under the general issue, or may be specially pleaded.

Thus the defendant may give accord and satisfaction in evidence under the general issue (x).

So the defendant may, by his plea, disclose special matter which shows that the plaintiff has

(u) See also *Brittridge's case*, 4 Co. 18. The words set out in the declaration were, *Mr. Brittridge is a perjured old knave*, and that is to be proved by a stake parting the lands of H. Martin and Mr. Wright; after a verdict for the plaintiff, the defendant succeeded in arresting the judgment; for though it was held, by the court, that the words in italics were actionable, they were of opinion, that their force was explained away by the latter, which showed that no judicial perjury was intended, so that had the latter words been omitted the plaintiff might have retained his verdict; but had the plaintiff omitted the latter words, the defendant might have shown the context by his plea, and so have defeated the action.

(x) *Lane v. Applegate*, 1 Starkie's C. 97. But the statute of limitations must, as will be seen, be pleaded.

sustained no damage from the words, provided the special damage be the gist of the action.

Where the plaintiff alleged that by reason of the speaking of the words he had lost his marriage with J. S. the defendant pleaded that J. S. was the aunt of the plaintiff (y): but, in such a case, the plea of *non damnificatus* would be bad (x).

In the next place there are some grounds of defence which *must* be pleaded specially, and which cannot be disclosed in evidence under the general issue, even although they afford a conclusive bar to the action.

In the first place, where the defendant means to insist that the imputation is true, he must as well, it seems, upon general principles of law, as on considerations of policy and convenience, plead such defence specially.

On legal principles he must do so, for the fact which supplies the justification is collateral to the cause of action, and the proof of it does not contradict or repel any matter which the plaintiff would be bound to prove (a).

(y) Dyer, 26. It has been said, that the defence would not be admissible under the plea of the general issue. B. N. P. 7. *tamen qu.*

(z) *Ib.*

(a) See *Smith v. Richardson*, Willes, 20. It seems, however, to be very questionable, whether the rule does not rest

On grounds of convenience and policy, it is obviously necessary, that a party charged with the commission of an illegal or immoral act, should be apprized, by means of a special plea, of the nature and circumstances of the charge, in order that he may be prepared to meet it, and, if it be unfounded, to refute it.

The rule of law upon this head has long been settled, that the defendant, if he mean to rely upon the truth of that which he has published, either in bar of the action or in mitigation of damages, must plead it specially.

Formerly a distinction was made in this respect between words imputing an offence generally, and such as charged a particular and specific one.

In the case of *Smith v. Richardson* (b), the twelve judges were unanimously of opinion, that where the words import a general felony, as

better upon the foundation of policy and convenience, than on the strict rule of pleading; in other words, it is doubtful whether the *falsity* of the charge is not, in principle, essential to the right of action. This is, however, a subject of mere speculation; for, undoubtedly, the rule is perfectly well settled on the grounds of public policy, that such a justification must be pleaded: and even independently of that rule, the proof of the truth of the charge would lie on the defendant, for the law would presume the plaintiff's innocence till the contrary appeared. Vide *supra*, p. 229. and p. 5. in the note.

(b) Willes, 20.

"Thou art a thief," or "Thou stolest a horse," or any other thing not specifying the person from whom or when and where it was stolen, the defendant ought not, upon the general issue, to be allowed to give the fact in evidence to mitigate damages. The words in the principal case were, "John Smith is a rogue, and hath stolen my beer; John Smith has robbed me of my beer." And eight of the judges were of opinion, that in no case whatever where the words imported felony or treason, such evidence ought to be admitted on not guilty pleaded; but four were of opinion that it might, where the words imported a particular felony.

But in the case of the *Bishop of Salisbury v. Nash*, cited in the above case, which was an action for saying of the plaintiff, "He preacheth nothing but lies in the pulpit," the defendant pleaded not guilty, and his counsel offered to give evidence of the truth of the words in mitigation of damages; but Lord Macclesfield refused to admit it with great indignation.

Where a particular offence, not capital, was charged (c), evidence of the truth was allowed under the general issue.

But in the case of *Underwood v. Parkes*, the defendant pleaded not guilty (d), and offered to

(c) B. N. P. 7.

(d) Str. 1200.

prove the words to be true in mitigation of damages, which the chief justice refused to permit, saying, that at a meeting of all the judges upon a case that arose in the Common Pleas, a large majority of them had determined not to allow it for the future, but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words. That this was now a general rule amongst them all, which no judge would think himself at liberty to depart from ; and that it extended to all sorts of words, and not barely to such as imported a charge of felony.

Where the justification is that the defendant has published no more than a true and faithful account of a judicial proceeding, considerable doubt has been entertained upon the question, whether the defence must be pleaded specially, or whether it be available under the general issue ; and the point, though it be exceedingly important, has not yet been finally decided.

An action was brought against the editor of the Times newspaper (*e*), for a libel on the plaintiff ; the publication complained of purported to be an account of an application to the Court of King's Bench, for an information against the plaintiff and Mr. Bingham, both justices of the

(*e*) *Curry v. Walter*, 1 B. & P. 525.

peace for Hampshire, for refusing to license an inn at Gosport. The defendant pleaded the general issue ; and at the trial, after the plaintiff had proved the publication of the paper by him, a person whom he employed to collect legal intelligence for the use of his paper, was called, in order to prove that the report was a true and faithful account of what had passed in the Court of King's Bench upon the motion. It was objected on the other side, that the defence ought to have been put upon the record, and could not be given in evidence under the general issue. The objection, however, was overruled by Eyre, C. J. and the jury found a verdict for the defendant. Afterwards a motion was made in arrest of judgment; one ground for which was, that the matter proved by the defendant, at the trial, had been improperly received in evidence under the general issue, and ought to have been pleaded in bar to the action. After argument, the court doubted upon this point, the case stood over, and no judgment was ever given.

Without presuming to venture an opinion on so important a point, which remains still undecided, it may be observed, that the question seems to resolve itself mainly into the consideration, whether the courts will deem it proper, on principles of convenience, to adhere to the ancient rule of law, according to which it seems



that such a collateral ground of defence ought to be specially pleaded, or will relax the rule in the present case, as has been done in many others.

In the first place, the defence is founded upon considerations of external policy, for, when it has been established, it does not destroy or contradict any matter which is essential to the cause of action, or which the plaintiff would be bound to prove under the general issue. Such a defence admits a publication of noxious matter, and the malice of the publisher, however inveterate, is wholly immaterial.

According, therefore, to the general and elementary principles of pleading, a justification of this nature, which confesses the facts alleged by the plaintiff, and avoids them by additional matter, ought to be pleaded specially (*f*).

Such a defence differs most essentially from all, where the occasion of speaking or publishing enures, *prima facie*, as a protection to the defendant, and throws it on the plaintiff to prove actual malice, for then, as has already been observed, the defence not only *may*, but *must* be offered in evidence under the general issue, and cannot be pleaded specially, because there the occasion does not supply an absolute bar to the action; the defence in question, on the other

(f) See *Smith v. Richardson*, Willes, 20.

hand, operates as a peremptory bar to the action, and, at all events, *may* be pleaded specially.

On the contrary, such a defence resembles a justification founded on the truth of the publication, for though the defendant does not allege that the fact imputed was true, yet he insists that his statement was true, namely, that the imputation was, in fact, part of a judicial proceeding, which he has faithfully reported. In the one case, as well as the other, the defence is founded on considerations of extrinsic policy.

It does not indeed by any means necessarily follow, that, because such a defence *may* be pleaded specially, it *must* therefore be pleaded specially; inasmuch as the general rule of pleading has been much relaxed, and many exceptions have been, from time to time, introduced. Still the question is, whether the case be an exception, or not, to the general rule, or whether, on grounds of policy and convenience, it ought to be an exception, and the onus of proving the affirmative clearly lies on those who assert it.

In the case of *Curry v. Walter* (g), though the evidence was admitted at Nisi Prius, under the general issue, yet the court were afterwards equally divided upon the subject, and no judgment was ever given. This case therefore sup-

(g) 1 B. & P. 525.

plies no authority whatever for relaxing the general rule of pleading in such cases.

The practice, on the contrary, has been, with a few exceptions, to plead such a defence specially (*h*).

Considerations of policy and convenience concur with the ordinary practice. It frequently happens, where such a defence is set up, that the whole question turns upon legal points, which are decided with greater convenience, with more expedition, and with less expense to the parties, when raised upon the face of the record by the pleadings, than where the defence is reserved for the trial, and then for the first time disclosed ; and it would frequently be highly inconvenient that it should be left to the court and jury, at *Nisi Prius*, to apply the report to the alleged libel, and to distinguish between what was justifiable and what was not so (*i*).

(*h*) See *Astley v. Yonge*, Burr. 807, which was previous to *Curry v. Walter*, and see *Stiles v. Nokes*, 7 East, 493.

(*i*) See 7 East, 493, where it was held, that where part of a publication consists of a report of judicial proceedings, and the rest of comment, since a separation is necessary, for the purpose of defence, the defendant ought to take upon himself the burthen of making it, in order that the court may see what parts he means to justify. And the defendant not having done so, the court held that the plea was bad, and would not permit the defendant to amend.

Where the defence is, that the defendant merely repeated that which he heard from another, and that he divulged his authority at the time of repetition, the ordinary course has been to plead the justification specially (*k*). And it has been held that, without such a plea, the fact is not available, even in mitigation of damages (*l*); and, therefore, it would not be safe to trust such a defence to the general issue. It seems however to be doubtful, whether such a plea, unless it disclosed circumstances which rendered the question of actual malice immaterial, would be good in law, as the effect would be to withdraw the question of actual malice from the consideration of the jury (*m*).

By the stat. 21 J. 1. c. 16. s. 3. it is enacted, that all actions on the case (other than for slander) shall be commenced and sued within six years next after the cause of such action or suit, and not after. And the said action on the case for words within two years after the words spoken, and not after. It has been held, under this statute, that the latter limitation applies to words in themselves actionable only, and not to cases where the special damage (*n*) is the gist of

(*k*) *Woolnoth v. Meadows*, 5 East, 463.

(*l*) *Mills v. Spencer*, Holt's C. 53.

(*m*) See 4 B. & A. 605. *supra*, 457.

(*n*) 6 Bac. Ab. 241. Cro. Car. 193. Salk. 206. 1 Sid. 95.

the action, nor to written slander, and it has been decided that cases of scandalum magnatum are not within the latter, though they are within the former, limitation (*o*).

It seems to be now fully settled, that if the defendant mean to avail himself of this statute (*p*), he must in all cases plead it.

Where the words are actionable, the time begins to reckon from the speaking of the words, but where the special damage is the gist of the action, it seems that it would not be sufficient for the defendant to aver, in his plea, that he did not speak the words within six years, because, though that was the fact, the special damage, which is the cause of action, may have arisen within the six years; he ought, therefore, to plead that the cause of action did not accrue within the limit.

But where special damage is consequent upon actionable words, it is (as is said) sufficient to plead that the defendant did not speak the words within the limited time.

4thly. How special matter must be pleaded.

Observations upon the manner of pleading relate to the plea of justification generally, to particular pleas, or to the joinder of different pleas.

(*o*) Cro. Car. 535.

(*p*) 2 Will. Saund. 63. a.

## 1. To the plea of justification generally.

The plea of justification in general must confess the publication as laid in the declaration, otherwise it will be bad on demurrer (*q*); and this is an immediate consequence resulting from the great rule of pleading, which requires the party pleading either to confess the previous matter, and avoid it, or to traverse it.

In *Johns v. Gittens* (*r*), the words laid in the declaration were, "Thou hast played the thief with me, and hast stolen my cloth and half a yard of velvet." The defendant pleaded that the plaintiff was his tailor, and that upon such a day he delivered to him a yard and a half of velvet, to make him a pair of hose, and he made them too straight; by reason whereof he spoke these words, "Thou hast stolen part of the velvet which I delivered you," denying that he spoke any words *aliter vel alio modo*.

The plaintiff demurred, and it was held that the plea was bad, for not confessing the words laid in the declaration (*s*).

(*q*) Jon. 307. Cro. Eliz. 153. A plea of justification will sometimes cure a defective declaration. The words were "He is forsworn," and there was no averment to connect them with a judicial oath; but the plea averring that the words were spoken in reference to a judicial oath, it was held that the defect was cured. Cro. Car. 288.

(*r*) Cro. Eliz. 239.

(*s*) See also Cro. Eliz. 153, *Bellingham v. Mynors*.

If the defendant justify specially, it will not be necessary for him in his plea to deny the innuendos and epithets contained in the declaration; for if the fact be justified (*t*), the motive, intention, and manner are immaterial. Unless, from the particular occasion of speaking the words, the day or the place become material, the plea should adopt the day and the place stated in the declaration without a traverse; but when they become material, and differ from those stated in the declaration, the plea should traverse the speaking of the words on the day or at the place laid in the declaration. Thus, if the plaintiff declare of words spoken at B., in the county of Salop, and the defendant mean to justify the publishing them in a judicial proceeding at Westminster, he should traverse (*u*) the publishing them at B., in Salop, at any time.

2. The special plea of justification, grounded upon the *truth* of the publication, may be considered, *first*, with reference to the matter contained in the plea; and, *secondly*, with regard to the charge complained of in the declaration.

The same degree of certainty and precision are required in this plea as are requisite in an indictment or information.

(*t*) Burr. 807.

(*u*) See the case of *Buckley v. Wood*, 4 Rep. 14. 1 Salk. 222. 1 Will. Saund. 82. n. 3.

In *Wyld v. Cookman* (x), the words were, "Thou wast forsworn in such a leet, on such a day." The defendant pleaded that the plaintiff the same day was sworn with others before the steward, to present, &c. and that they presented such a ditch not scoured *ad nocumentum*, &c. which was false, and so justifies, but did not say that they knew it to be false of their *own proper knowledge*. It was moved, on demurrer, that they might have presented it upon evidence. Gawdy and Fenner, Justices, held, that it was properly and commonly to be intended that the presentment was false of their own knowledge, and so perjury; and that if they presented it upon evidence, the plaintiff ought to shew it in his replication. But Popham, J. said, that a man may not justify by intendment, but that it ought to have been precisely alleged. But there was another defect in the plea, which was held by all the justices to be incurable, namely, the want of an allegation that the ditch was within the leet; for if not, then the presentment thereof was out of their charge, and there was no perjury.

Secondly, as to the nature of the plea, with reference to the words laid in the declaration.

(x) Cro. Eliz. 492. as to the degree of certainty and particularity which is requisite in a plea. See the cases cited below 478, &c.



Where the original charge is in itself specific, the defendant need not further particularize it in his plea. In an action on the case (*y*) for calling the plaintiff thief, and saying that he stole two sheep of J. S., the defendant pleaded that the plaintiff stole the same sheep, by reason of which he called him thief, as well he might; and the plea was held to be good (*z*).

Though the charge imputed to the plaintiff be general, as laid in the declaration, the defendant must, in his plea, charge him with specific (*a*) instances of offences of the same nature with the general charge. Thus a defendant is not at liberty to charge a person with swindling, without shewing specific instances of it; for whenever one charges another with fraud, he must know the particular instances upon which his accusation is founded, and therefore ought to disclose them (*b*).

In *Morrice v. Langdale* (*c*), which was an action for calling the plaintiff (who was a stock-jobber) a lame duck, the defendant justified, pleading generally that the plaintiff had not

(*y*) Br. action sur cas. 27 H. 8. 22. pl. 3.

(*z*) 1 Roll. Ab. 87.

(*a*) Styles, 118. Strachey's case. See the illustrations cited below, and *Lane v. Howman*, 1 Price, 76.

(*b*) *Johnson v. Stuart*, 1 T. R. 748.

(*c*) 2 B. & P. 284.

fulfilled his contracts. Upon demurrer, Lord Eldon, C. J. observed, that it had been strongly argued in support of the demurrer to the plea, that in consequence of its generality the plaintiff must proceed to trial at the hazard of being able to produce evidence applicable to any contract which he ever made. But the declaration itself was defective, and the plaintiff had leave to amend.

In the case of *Newman v. Bailey*, the plaintiff, a justice of the peace, brought an action against the defendant, for having charged him with "pocketing all the fines and penalties forfeited by delinquents whom he had convicted, without distributing them to the poor, or in any manner accounting for a sum of £50. then in hand." The defendant pleaded that the plaintiff was a justice of the peace, and that during the time he acted as such, he convicted divers and sundry persons respectively, in divers and sundry fines and sums of money, for and on pretence of their having respectively committed divers respective offences against the form of divers statutes of this realm; which said respective fines and sums of money, amounting in the whole to £50. he received of the respective delinquents so by him convicted, and had not paid the same to the several persons to whom the same ought to have been paid by virtue of the respective statutes,

but had kept and detained the same, &c. To this there was a special demurrer, and the court were clearly of opinion that the plea was bad, because it did not specify any one fine or penalty which had been unjustly levied (*d*).

The matter alleged in the justification to be true, must, in every respect, correspond with the imputation complained of in the declaration. Thus, where the defendant, in the first instance, charges the plaintiff with having feloniously stolen one kind of chattel, he cannot afterwards justify by pleading that the plaintiff had really been guilty of stealing a different one (*e*). And so with regard to every circumstance at all material, the facts set up by way of justification in the plea must be strictly conformable with the imputation charged in the declaration. The words for which the action was brought charged the plaintiff with having been a bankrupt on the first day of April, in the 17th year of James the first. The defendant pleaded that the plaintiff

(*d*) Hil. 16. G. 3. 2 Chitty's C. T. M. 665. So, where a libel charged an attorney with general misconduct, viz. gross negligence, falsehood, prevarication, and making out expensive bills of costs, in respect of business done for the defendant, a plea of justification merely repeating the same general charges, without specifying any particular acts of misconduct, was held on demurrer to be insufficient. *Holmes v. Catesby*, 1 Taunt. 543.

(*e*) *Hilsden v. Mercer*, Cro. J. 676.

was a bankrupt on the first day of April, in the 15th year of the same reign, and that therefore he published the words ; and the plea was held bad (f), because it was not averred that the plaintiff continued a bankrupt to the time of publishing the words, for he might afterwards recover his credit in trade.

In *Fysh (g) v. Thorowgood*, the plaintiff declared “ that a commission issued out of the Exchequer, directed to the plaintiff and one J. S. by force whereof they took and returned the examinations of several witnesses, and that thereupon the defendant said, that the plaintiff had returned as depositions the examination of *divers* that were never sworn.” The defendant pleaded in bar, that he did return the examination of one J. S. who was never sworn. Upon demurrer, it was adjudged that this was no good justification in bar, because it is of one witness only, whereas the charge was in the plural number.

Where the declaration alleged that the plaintiff was lawfully possessed of mines and ore gotten and to be gotten from them, and was in treaty for the sale of the ore ; and that the defendant published a malicious, injurious, and unlawful advertisement, cautioning persons against purchas-

(f) *Upshear v. Betts*, Cro. J. 578.

(g) Cro. Eliz. 623.

ing the ore *per quod* he was prevented from selling it ; plea, that the adventurers or persons having an interest or share in the mine, thought it their duty to caution persons against purchasing the ore, &c., as persons purchasing such ore would be called on for the amount, and that a bill in equity was about to be filed by the adventurers ; it was held, on special demurrer, that the plea was insufficient, both because it did not disclose the names of the adventurers, and show who they were ; and secondly, because it did not show that the defendant, in publishing the advertisement, acted under the authority of the adventurers (h).

So it was held, that a plea that the plaintiff had been confined in England on a charge of high treason, was not supported by proof that the plaintiff had been apprehended by virtue of a warrant from the Duke of Portland, one of the secretaries of state, on suspicion of high treason (i).

Where the libel charged the plaintiff with acts of barbarity to a horse, and that one of its eyes was literally knocked out, and that the plaintiff had ordered a person who had the care of it not to let any person see it ; and issue was taken, on a general plea that the statement was true, and the

(h) *Rowe v. Roach*, 1 M. & S. 304.

(i) *Bell v. Byrne*, 13 East. 554.

jury negatived the fact of knocking out the eye, but found for the defendant as to the rest; the court held that the plaintiff was entitled to the verdict (*j*).

But it is sufficient if the substance of the libelous charge be justified.

The supposed libel (*k*) alleged that a serious misunderstanding had taken place among the independent dissenters of M. and their pastor, in consequence of some personal invectives thrown from the pulpit by the latter, and that the matter was to be taken up seriously. The defendant in his plea alleged that the plaintiff, whilst officiating as minister, published from a part of the chapel, in the presence of his congregation, of and concerning one M. F. the teacher of a Sunday school, the scandalous words following: "I have something to say which I have thought of saying for some time, namely, the improper conduct of one of the female teachers: her name is Miss Fair, her conduct is a bad example and disgrace to the school; and if any of the children dare to ask her to go home, she shall be turned out of the school and never enter it again: Miss Fair does more harm than good, and thereby gave great offence to divers of the dissenters, to wit one—

(*j*) *Weaver v. Loyd*, 2 B. & C. 678.

(*k*) *Edwards v. Bell*, 1 Bing. 403.

and one—and occasioned a serious misunderstanding amongst the dissenters.” After a verdict for the defendant, the court held that the plea was an answer to the declaration, although the libel alleged a misunderstanding to have taken place between the pastor and his congregation, whilst the justification alleged the misunderstanding to have taken place among the congregation only.

Care should be taken to apply the justification where the matter of justification admits of it, to the whole of the imputation contained in the declaration. If any part be left uncovered, the plaintiff will, on proof of the words or libel stated (or without proof if the general issue be not pleaded), be entitled to damages in respect of that part of the charge to which the justification is not pleaded, even although such justification might have been pleaded to the whole charge. The plaintiff declared for these words (*inter alia*), he (meaning the plaintiff,) has robbed me to a serious amount; the defendant pleaded the general issue; and as to the words, “He has robbed me,” pleaded that the plaintiff had on such a day, robbed him of a loaf of the value of threepence; the plaintiff proved the words as laid; the jury found the justification as pleaded, but were directed by the learned judge who tried the cause, to give some damages in respect of the words which were not justified; and they found a ver-

dict for the plaintiff, with forty shillings damages. The court (*l*), afterwards discharged a rule nisi, which had been obtained for entering judgment for the defendant, *non obstante veredicto*. It would be proper, in such a case, to plead the justification to the whole of the words, and to aver that the plaintiff had robbed the defendant to a serious amount, alleging the robbery according to the facts; this would raise the question, of fact, as it seems, rather than of law, whether, as alleged, the robbery was to a serious amount.

Where the defendant pleads in justification, that the alleged libel is a fair report of a judicial proceeding, he ought to shew in his plea that he has given a true and accurate report of the proceeding.

And it is not sufficient to allege that the alleged libel is in *substance* a true and accurate report. For the substance is nothing more than the inference which the publisher of the libel has drawn from what passed at the trial (*m*), it ought to be shewn that the report is a true and accurate report, or at least that no necessary matter has been omitted, in order that the court may, on

(*l*) Bayley and Holroyd, Js. in the C. P. Lancaster.

(*m*) *Flint v. Pike*, 4 B. & C. 473.



demurrer, be able to decide whether it was lawful to publish that report (n).

Besides, the plea would neither deny that the libel was published with the malicious motives alleged in the declaration, nor would it shew to the court that it was necessary that the public should be made acquainted with the matter stated in the alleged libel. The plaintiff declared on a libel which professed to give a short summary of a trial of an action, and after that summary, to give an outline of the speech of the counsel for the defendant in that cause; and the libel set out part of a speech, containing severe reflections on the conduct of the plaintiff, the attorney for the plaintiff in that cause; the defendant pleaded that the alleged libel was, in substance, a true report of the trial. But the court, upon a general demurrer, gave judgment for the plaintiff (o).

So again, where the plaintiff declared on a libel in a public newspaper, which purported to contain a true account of the speech of a counsel, upon an indictment for a conspiracy; the report,

(n) See the observations of Littledale, J. in *Flint v. Pike*, 4 B. & C. 473. In the case of *Duncan v. Thwaites*, 4 B. & A. 612. Abbott, C. J. said, "If a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence.

(o) *Flint v. Pike*, 4 B. & C. 473.

after setting out the speech, added, " the first witness called was R. P. who proved all that had been stated by the counsel for the prosecution ; and then stated, that in consequence of another witness being unable to prove a deputation from the under-sheriff, the jury, under the direction of the court, were obliged to give a verdict of acquittal. The defendant pleaded (*inter alia*) that, at the trial of the indictment, the counsel for the prosecution made the speech set out in the supposed libel ; and that having so stated the facts, the said R. P., by his testimony, proved all that had been so stated by the counsel for the prosecution, and then alleged the inability of the other witness, &c. and the consequent acquittal. And, upon a general demurrer, it was held that the plea could not be supported: the publication, to be justifiable, ought to have stated the evidence, in order that those who read the report might judge for themselves ; and if a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not the conclusion which he himself draws from the evidence (*p*).

Where the defendant justifies the speaking of the words, or publishing the alleged libel, in the course of a parliamentary or judicial proceeding, he must

shew, in his plea, that he has been guilty of no publication, which the nature of the proceedings did not call for, or, at least, care must be taken that no publication, stated in the declaration, is left unprotected by the matter of justification pleaded. The defendant (*q*) had exhibited his bill in the Star Chamber, alleging that the plaintiff was a procurer of murders and piracies ; the declaration alleged the exhibiting the bill, and that the said defendant, at B., in the county of Salop, said, that the said bill, and the matters contained therein, were true. The defendant, in his plea, confessed the exhibiting of the bill in the Star Chamber, and that he, in the said court at Westminster, spoke the said words *absque hoc*, that he spoke the words in the county of Salop before or after the day mentioned in the declaration, by which he excluded the day itself, for which reason the plea was held to be insufficient. But judgment for the plaintiff in this case was afterwards reversed, upon writ of error in the Exchequer Chamber, because the defendant had asserted in the county of Salop nothing more than that the matters contained in the bill were true, without specifying the contents of the bill.

Where the alleged libel was contained in a petition to the members (*r*) of a committee of the

(*q*) *Buckley v. Wood*, 4 Co. 15. ✓

(*r*) *Lake v. King*, 1 Saund. 120.

House of Commons, the plaintiff, in his declaration, alleged generally that the defendant had published the libel to "divers subjects." The defendant justified the publication to divers persons being members of the committee, and averred it to be the same publishing of which the plaintiff had complained, and the plea was held sufficient. But it seems, that if the plaintiff, in his declaration, allege a publication to divers people by name, if the defendant justify the publication to some of them by name, he must traverse a publication to the rest.

And the reason of the distinction is, that in the former case, where a general publication to divers subjects is alleged, the plea that he published to divers subjects being members of the committee, is consistent with the declaration, and therefore with the averment that the publication is the same. But if the plaintiff declare of a publication to A. B. C. and D., the defendant, in justifying a publication to A. and B., cannot aver it to be the same publication with that complained of, but should traverse the publication to C. and D. (s)

Where part of a publication consists of a report of judicial proceedings and the rest of comment, since the separation is necessary for the

(s) See 1 Will. Saund. 133. n. 4, and 22. n. 2.

purpose of defence, the defendant ought (*t*) to take upon himself the burthen of making it, in order that the court may see what parts he means to justify. And if he does not, the court will not allow him to amend his plea.

A plea of justification, however, may be good, with a general reference to certain parts of the libel set forth in the declaration, if the court can see with certainty what parts are referred to ; as if the reference be to so much of the libel as imputes to the plaintiff such a crime as perjury, that would be sufficient without repeating all those parts again, which would lead to prolixity of pleading and ought to be avoided (*u*).

The defendant may, under the statute (*x*), by leave of the court, join a general plea of not guilty to the whole declaration, with a plea of special justification to the whole or part (*y*). Thus he may justify so much as imputes to the plaintiff the commission of a specific crime, as perjury (*z*). And he may plead not guilty, as to part of the words, and justify as to the residue (*a*).

(*t*) 7 East, 493.

(*u*) Per Le Blanc, J. 7 East, 507.

(*x*) 4 Ann. C. 16.

(*y*) See Tidd, 603, 4th edit.

(*z*) *Styles v. Nokes*, 7 East, 493.

(*a*) *Rish v. Holt*, Cro. J. 267.

When the words, as stated on the record, appear to be demurrable, it may be useful to recollect the rule, which Sir E. Coke (*b*) termed "an excellent point of learning in actions for slander," namely, "observe the occasion and cause of speaking them, and how it may be pleaded in the defendant's excuse. When the matter in fact will clearly serve for your client, although your opinion is, that the plaintiff has no cause of action, yet take heed you do not hazard the matter on a demurrer, in which, upon the pleading and otherwise, more perhaps will arise than you thought of; but first take advantage of matters of fact, and leave matters of law, which always arise upon the matters of fact, *ad ultimum*, and never at first demur in law, when, after the trial of the matters in fact, the matter in law will be saved to you."

(*b*) 4th Rep.

## CHAPTER XVII.

*Of the Replication.*

IT seldom happens that any thing can be replied to the defendant's special plea, except the general replication of *de injuriâ propriâ*, &c. which puts the whole of the defendant's plea in issue (a).

In some instances, however, a special replication becomes necessary. As, where the original slander imputes to the plaintiff the commission of a specific crime, and the defendant pleads *in justification* that the plaintiff was really guilty, the plaintiff may reply, that, after his commission of the crime, and before the speaking of the words, he was pardoned (b).

And it has been said, that in such case it makes no difference whether the pardon be a special one, of which the defendant was ignorant, or a general one, since a man who takes upon himself to spread slander, does it at his peril ; but that if a man who had committed felony, secretly procure a pardon, and another, not knowing of

(a) 1 Saund. 244. n. 7.

(b) *Cuddington v. Wilkins*, Hob. 81.

the pardon, cause him to be apprehended for felony, he would be justified, because what he *did* was for the advancement of justice.

But where the pardon is general, containing clauses of exception, it seems the plaintiff should aver that his case does not fall within any of the exceptions (c).

And even after a pardon, if the defendant merely say that the plaintiff was a thief, the pardon (d) will not be available.

Where the plaintiff has stated the publication, generally, to have been made to divers persons, not naming them, and the defendant justifies the publication to particular persons, as to the members of a committee of the House of Commons, if the plaintiff mean to insist upon a publication to any others, he should state such publication by way of new assignment (e).

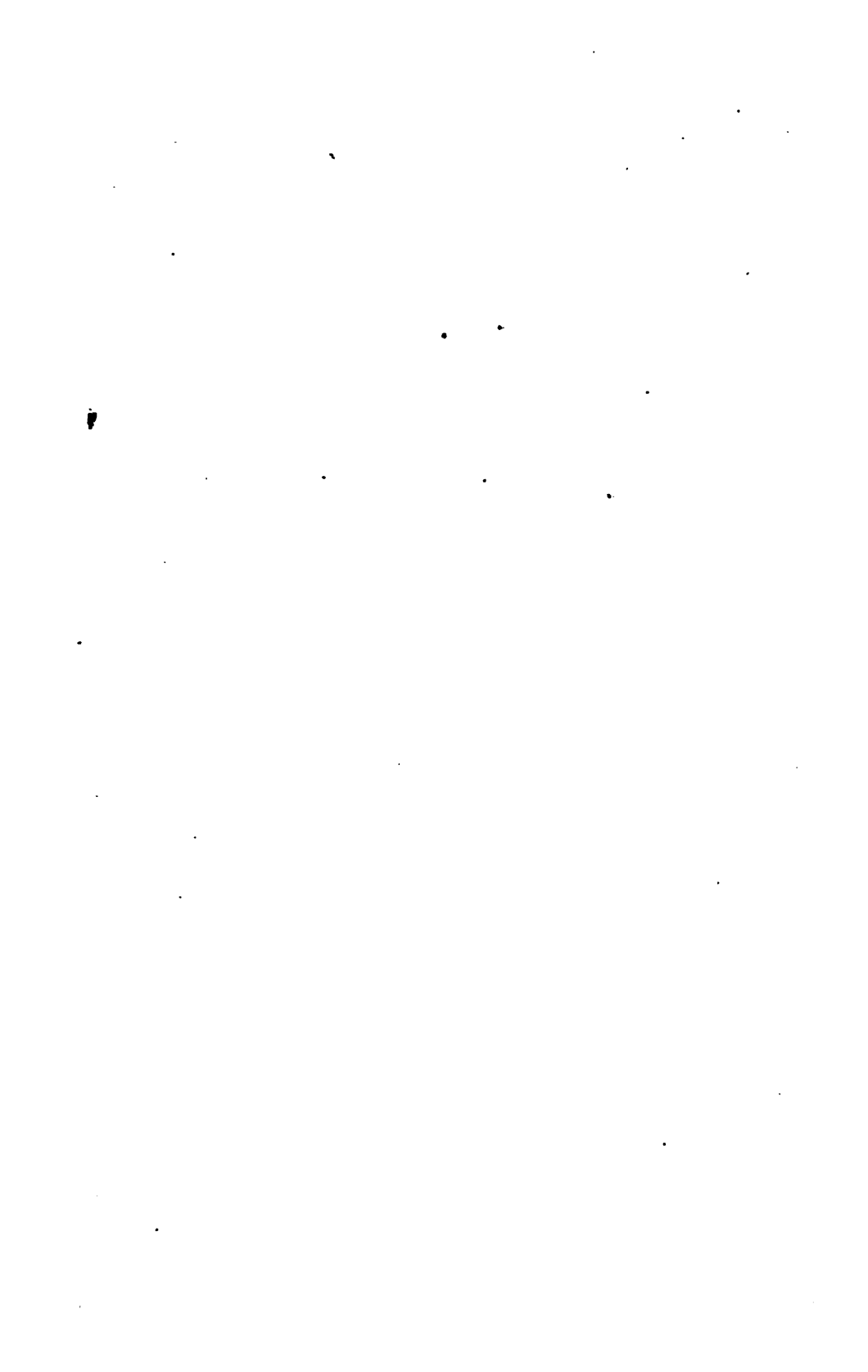
(c) Hob. 67.

(d) Hob. 82.

(e) See 1 Saund. 133. and Chitty on Pleading, 603.

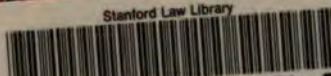








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